A HISTORY OF ENGLISH LAW

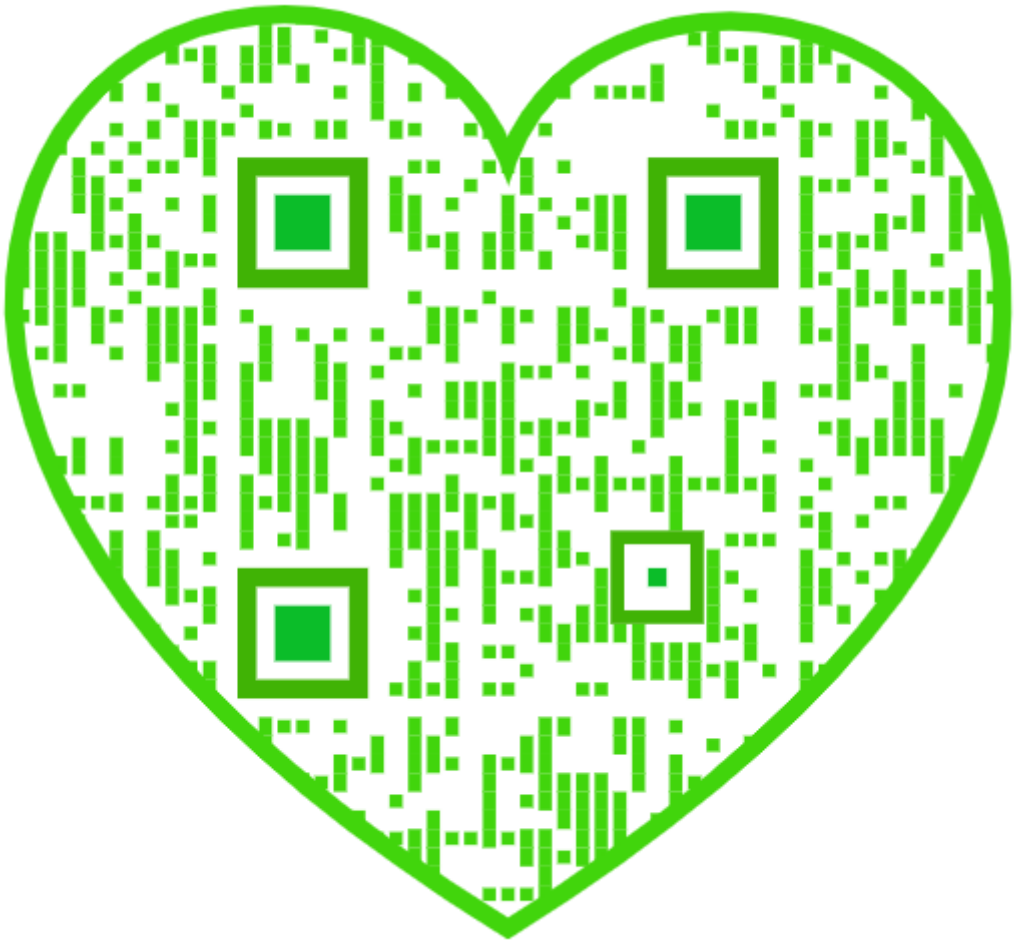
W. S. HOLDSWORTH, K.C., D.C.L.

VINERIAN PROFESSOR OF ENGLISH LAW IN THE UNIVERSITY OF OXFORD; FELLOW OF ALL SOULS COLLEGE, OXFORD; LATE FELLOW OF ST. JOHN'S COLLEGE, OXFORD; FOREIGN ASSOCIATE OF THE ROYAL BELGIAN ACADEMY; FELLOW OF THE BRITISH ACADEMY

VOLUME IV

To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law. ROGER NORTH

METHUEN & CO. LTD.
36 ESSEX STREET W.C
LONDON



Volumes I-III

First Published . . . . *May* *1903*
Second Edition . . . . *October* *1914*
Third Edition, Rewritten . . *1922-1923*

Volumes IV and V

First Published in 1923

16-298 9566

PRINTED IN GREAT BRITAIN

TO

THE RIGHT HONOURABLE FREDERICK EDWIN

EARL OF BIRKENHEAD

SOMETIME LORD HIGH CHANCELLOR OF GREAT BRITAIN

THIS WORK

IS

BY HIS LORDSHIP'S PERMISSION

RESPECTFULLY DEDICATED

PREFACE

THE fourth and fifth volumes of my history begin the period from 1485 to 1700—the period which saw the development of our modern English law from its mediæval basis. This instalment carries the history of the influences which shaped the development of the law down to the first half of the seventeenth century. The next volume will deal with the history of English public law in the seventeenth century, and with the influences which shaped the development of the law in the latter part of that century. These and the following volumes thus break new ground, as, except for Reeve's history which goes no further than the end of Elizabeth's reign, no one has as yet attempted to write the legal history of this period. In these circumstances a few explanatory words as to the plan upon which these two volumes have been composed seem to be necessary.

The first chapter of the fourth volume deals with the public law of the sixteenth century, and the second chapter with the enacted law of the sixteenth and early seventeenth centuries. Both these chapters are necessarily long. In the first chapter it has been necessary to write at length of the public law of the sixteenth century for two reasons. In the first place, there is as yet no constitutional history of the sixteenth century which embodies the results of recent researches—nothing which corresponds to Stubbs's Constitutional History in the preceding period. In the second place, though continental influences affected the development of English law both public and private in this century, the policy of the Tudor sovereigns accentuated the causes, which, in the preceding period, were making for a purely native development, and gave to English law

and institutions a form which differed fundamentally from the law and institutions of continental states. But to understand this policy, and to grasp the manner in which continental influences helped the Tudors to build up the modern English state on the foundation of mediæval institutions, mediæval ideas, and mediæval law, it is necessary to compare the English with the continental development. The second chapter, which deals with the enacted law of the sixteenth and early seventeenth centuries, covers much ground because, just as the legislation of Edward I. marked out the main lines upon which the mediæval common law was developed during the two succeeding centuries, so the legislation of the Tudor period marked out the main lines upon which the modern common law was developed down to the legislative reforms of the nineteenth century. It will be seen, too, that in this chapter I have been obliged to trespass upon the domain of the economic historian. The bulk and importance of the economic statutes of this period, and their intimate relation to many branches of law public and private, has made it necessary to deal with them in some detail. But I think that their treatment from a legal, rather than from an economic point of view, may perhaps help the economic historian as much as the works of economic historians have helped me to understand this legislation. This part of my History was written before 1914; and it is curious to see how, in the period of national emergency which followed the outbreak of the Great War, expedients were adopted which were similar to those which had commended themselves to the statesmen who lived through many periods of national emergency in the sixteenth century.

The fifth volume deals with the professional development of English law during the sixteenth and early seventeenth centuries. The outstanding feature of this development is the expansion of English law by the work of the many courts which, during this period, filled up some of the gaps which had been caused by the serious limitations upon the sphere of the mediæval common law. The growth of these bodies of law is the subject of the first two chapters of this volume. The third chapter deals

with the growth of the common law during this period, and the beginnings of that contest for supremacy with these rival bodies of law, which marks the first half of the seventeenth century. That contest was, as we shall see in the sixth volume, intimately bound up with the constitutional controversies of that century. But the position taken up by the common law, both in relation to these purely professional contests between the common law and its rivals, and in relation to the greater constitutional controversies, was outlined by Edward Coke, who has some claims to be considered the central figure in English legal history. His work as a Parliamentary statesman gave to the common law the position in the English state which it holds to-day. His literary work was the complement of the political work of the Tudor dynasty; for it summed up, adapted to modern conditions, and harmonized with the modern law, the mediaeval doctrines which still formed the basis of the English common law.

As in the preceding volumes, I have to thank Dr. Hazel, All Souls Reader in English Law in the University of Oxford, and Reader in Constitutional Law and Legal History in the Inns of Court, for the benefit of his criticism, and his help in correcting the proof sheets; and Mr. Costin, Fellow and Lecturer in History at St. John's College, Oxford, for making the list of statutes.

All Souls College, Oxford
November, 1923

PLAN OF THE HISTORY

(Vol. I.) BOOK I.—The Judicial System: Introduction. Chap. I. Origins. Chap. II. The Decline of the Old Local Courts and the Rise of the New County Courts. Chap. III. The System of Common Law Jurisdiction. Chap. IV. The House of Lords. Chap. V. The Chancery. Chap. VI. The Council. Chap. VII. Courts of a Special Jurisdiction. Chap. VIII. The Reconstruction of the Judicial System.

(Vol. II.) BOOK II. (449-1066)—Anglo-Saxon Antiquities: Introduction. Part I. Sources and General Development. Part II. The Rules of Law: § 1 The Ranks of the People; § 2 Criminal Law; § 3 The Law of Property; § 4 Family Law; § 5 Self-help; § 6 Procedure.

BOOK III. (1066-1485)—The Mediæval Common Law: Introduction. Part I. Sources and General Development: Chap. I. The Intellectual, Political, and Legal Ideas of the Middle Ages. Chap. II. The Norman Conquest to Magna Carta. Chap. III. The Reign of Henry III. Chap. IV. The Reign of Edward I. Chap. V. The Fourteenth and Fifteenth Centuries. (Vol. III.) Part II. The Rules of Law: Chap. I. The Land Law: § 1 The Real Actions; § 2 Free Tenure, Unfree Tenure, and Chattels Real; § 3 The Free Tenures and Their Incidents; § 4 The Power of Alienation; § 5 Seisin: § 6 Estates; § 7 Incorporeal Things; § 8 Inheritance; § 9 Curtsey and Dower; § 10 Unfree Tenure; § 11 The Term of Years; § 12 The Modes and Forms of Conveyance; § 13 Special Customs. Chap. II. Crime and Tort: § 1 Self-help; § 2 Treason; § 3 Benefit of Clergy, and Sanctuary and Abjuration; § 4 Principal and Accessory; § 5 Offences Against the Person; § 6 Possession and Ownership of Chattels; § 7 Wrongs to Property; § 8 The Principles of Liability; § 9 Lines of Future Development. Chap. III. Contract and Quasi-Contract. Chap. IV. Status: § 1 The King; § 2 The Incorporate Person; § 3 The Villeins; § 4 The Infant; § 5 The Married Woman. Chap. V. Succession to Chattels: § 1 The Last Will; § 2 Restrictions on Testation and Intestate Succession; § 3 The Representation of the Deceased. Chap. VI. Procedure and Pleading: § 1 The Criminal Law; § 2 The Civil Law.

(Vol. IV.) BOOK IV. (1485-1700)—The Common Law and Its Rivals: Introduction. Part I. Sources and General Development: Chap. I. The Sixteenth Century at Home and Abroad. Chap. II. English Law in the Sixteenth and Early Seventeenth Centuries: The Enacted Law. (Vol. V.) Chap. III. English Law in the Sixteenth and Early Seventeenth Centuries: Developments Outside the Sphere of the Common Law—International, Maritime, and Commercial Law. Chap. IV. English Law in the Sixteenth and Early Seventeenth Centuries: Developments Outside the Sphere of the Common Law—Law Administered by the Star Chamber and the Chancery. Chap. V. English Law in the Sixteenth and Early Seventeenth Centuries: The Development of the Common Law. (Vol. VI.) Chap. VI. The Public Law of the Seventeenth Century. Chap. VII. The Latter Half of the Seventeenth Century: The Enacted Law. Chap. VIII. The Latter Half of the Seventeenth Century: The Professional Development of the Law.

(Vol. VII.) Part II. The Rules of Law. Chap. I. The Land Law: § 1 The Action of Ejectment; § 2 Seisin Possession and Ownership; § 3 Contingent Remainders; § 4 Executory Interests; § 5 Powers of Appointment; § 6 The Rules Against Perpetuities; § 7 Landlord and Tenant; § 8 Copyholds; § 9 Incorporeal Things; § 10 Conveyancing; § 11 The Interpretation of Conveyances. Chap. II. Chattels Personal: § 1 The Action of Trover and Conversion; § 2 The Ownership and Possession of Chattels; § 3 Choses in Action. Chap. III. Contract and Quasi-Contract: § 1 The Doctrine of Consideration; § 2 The Invalidity, the Enforcement, and the Discharge of Contract; § 3 Quasi-Contract. Chap. IV. The Law Merchant. I.—Commercial Law: § 1 Usury and the Usury Laws; § 2 Negotiable Instruments; § 3 Banking; § 4 Commercial Societies; § 5 Agency; § 6 Bankruptcy. II.—Maritime Law. III.—Insurance. Chap. V. Crime and Tort. Lines of Development. § 1 Constructive Treason and Other Cognate Offences; § 2 Defamation; § 3 Conspiracy, Malicious Prosecution, and Maintenance; § 4 Legal Doctrines Resulting from Laws Against Religious Nonconformity; § 5 Lines of Future Development; § 6 The Principles of Liability. Chap. VI. Status: § 1 The King and Remedies Against the Crown: § 2 The Incorporate Person; § 3 British Subjects and Aliens. Chap. VII. Evidence, Procedure, and Pleading: § 1 Evidence; § 2 Common Law Procedure; § 3 Equity Procedure.

CONTENTS

PAGE

PREFACE vii
PLAN OF THE HISTORY xi
LIST OF CASES xxiii
LIST OF STATUTES xxvii

BOOK IV

THE COMMON LAW AND ITS RIVALS

INTRODUCTION 3-6

PART I

SOURCES AND GENERAL DEVELOPMENT

CHAPTER I

THE SIXTEENTH CENTURY AT HOME AND ABROAD

The new influences 7
The changed European conditions 8-10
Similar changes in England 10
Plan of this chapter 10
I. The new ideas—Renaissance and Reformation 11-54
Causes of the change from mediæval to modern 11-13
Position of theology—difficulty of a peaceable change . . . 13
Large effects of the Reformation 14
Its moral aspect 14
Its intellectual aspect 14-16
Different effects in Latin and Teutonic countries . . . 15-16
Its political aspect 16-21
Relation of church and state 16
Gradual reform and readjustment—policy which might have stopped the Reformation 17
It got protection from the state in Germany 17-18
Strengthens the power of the state 18-19
But not immediately 19-20
In the end completes the structure of the modern state . . 20-21
Modifies effects of Renaissance and the theory of the state. . 21
Helps opposition to state's absolute authority 21-22
Helps growth of international law 22
Influence of mediæval theory on modern world 22-23
Renaissance and Reformation in England 23
Difficulties confronting Henry VII. 23
Causes of these difficulties 23-25
Need for strong government 25
Character of Henry VII. 25-26
Abuse of the law—Empson and Dudley 26-27
Reasons for this abuse 27
Success of Henry—old institutions permeated with a new spirit . . 27

	PAGE
Effects of his foreign policy	28
His reign foreshadows main lines of Tudor policy	28-29
The New Learning in England	29-30
Henry VIII. and the New Learning	30
Henry VIII.'s character	30-32
Period of Wolsey's control—his unpopularity	33-34
The Divorce—his fall	34
Henry takes control—the Divorce shapes his religious policy	34-35
Worked out in conjunction with Parliament	35-36
Destruction of the monasteries	36-37
Wise disposition of their wealth	37
National unity—incorporation of Wales and Durham	37-38
His policy preserves institutional and legal continuity	38
The Reformation and the growth of the state	38
The Pilgrimage of Grace—aims of the rebels	38-39
Effect of its suppression	39
Henry VIII. and foreign Protestants	39
Cranmer	39-40
Edward VI. and Mary's reigns	40-41
The Reformation and the New Learning	41-43
Effect of destruction of the monasteries	42
Beginnings of reconstruction	43
Political situation at Elizabeth's accession	43-44
Her religious and foreign policy	44-45
Secures peace for thirty years	45
Elizabeth and Philip II.	46
Defeat of the Armada	46
Emergence of modern system of international politics	46-47
Emergence of permanent factors in English politics	47-48
Strong points of her religious settlement	47
Catholic opposition allied to feudal lawlessness	47
Puritan and Parliamentary opposition	47-48
Germs of political parties	48
Emergence of modern social and economic factors	48-49
Elizabeth's reign the dividing line between mediæval and modern	49
True period of the English Renaissance	49
Illustrated by the works of Francis Bacon	49-52
Root idea of his philosophy	50-51
Relation to Old and New Learning	51
Relation to theology	52
Elizabeth's share in producing these results	52-53
Emergence of new problems	53
Complexity of English Government in this period	53-54
Resemblances and contrasts with continental countries	54
II. The New Institutions—the Rise of the Modern State	54-217
Character of constitutional changes in England and abroad	54-55
France the typical continental country	55-56
The new machinery of central government	56-107
The continental development	56-60
The king's Council	56-57
Membership	57
Powers	58
Relation to older courts	58-59
Conflicts—jurisdictional and political	59
Their result	59-60
Similarities in the English development	60
Specialization of functions of government	60
Council and Star Chamber	60-61
Powers of Council still wide and vague	61
The Records of the Council's proceedings	61-63
Composition and organization of the Council	64-70
Changed character of its composition	64
Number of members	64

PAGE

Privy and ordinary councillors 64-65
Meetings and quorum 65
Official members—heads of Household and Government departments 65-66
The Secretary of State 66-67
Committees 67-68
Commissions appointed by it—their significance 68-70
Question of their legality 70
Activities and Constitutional position of the Council 70-105
(i) The Council and Local Government 71-80
Increased control 71-72
The Provincial Councils 73-74
The judges of Assize 75-76
The Lord-Lieutenants 76-77
Control over local officials 77-79
Its protection of local officials 79
Arbitration in disputes between local governing bodies and officials 79-80
(ii) The Council and the National Church 81-83
Use made by it of the ecclesiastical organization . . . 83
(iii) The Council and the Judicial System 83-88
Acted as umpire between rival jurisdictions 84-85
Beginnings of administrative law 85-86
Reasons of State and the ordinary law 86-87
(iv) The Council and Parliament 88-105
Spheres of action of Council and Parliament 88-90
Use made by the Tudors of Parliament 90-92
Tact shown by them 92-93
The composition of the House of Commons 93-96
Membership—duty or privilege 93-94
Modes of influencing elections 94-96
Control over the business of the House of Commons . . 96-99
How bills were prepared 96-97
Position of the Speaker 97-98
The Privy Councillors in the House 98-99
Parliament and Legislation 99-104
Statutes and Proclamations 99-101
Sphere of Proclamations was ill-defined . . . 101-102
Henry VIII.'s Statute of Proclamations 102-103
Its repeal 104
Parliament and Taxation 104-105
Predominant position of the Tudor Council . . . 105-106
Resemblances between English and Continental states . 106-107
The Relation of the Old to the New Machinery of Government . . 107-190
The central government and feudalism—Mediæval developments 107-108
Centres of resistance of the older order 108
I. Local Government 108-166
Continental development 108-109
Growth of official bureaucracy dependent on the Conseil du roi . 109-110
Backed by a standing army 110
Consolidated by a system of administrative law 110-111
The English development contrasted 111-112
Importance of this development in English public law . . 112
The literature of this branch of the law 112-121
The mediæval books which got into print 112-115
Books dealing with the justices of the peace and the older officials 115-120
Fitzherbert 115-116
Crompton 116
Lambard 117-118
His Eirenarcha 119
Dalton's book on the sheriff 119
Lambard on constables 119-120

PAGE

Kitchin 120-121
Shepherd's Court Keeper's Guide 121
The history of local government 121-166
The Earlier Mediæval Period 122-133
Communal courts and officials 122-125
The feudal element 125-126
The franchises 127-133
The country at large 127-131
The boroughs 131-133
The Later Mediæval Period 134-137
The justices of the peace and the old machinery of government 135-137
The Sixteenth Century 137-166
(i) The New Powers of the Justices of the Peace . . . 137-145
The Single Justice 138-140
Two or More Justices 140-142
The Quarter Sessions 142-145
(ii) The New Organization of the Justices of the Peace . 145-151
The differentiation of the sessions 146-149
The beginnings of a clerical staff 149-151
(iii) The Rise of the Parish 151-163
Theories of earlier writers 151-152
The parish as a unit of ecclesiastical government . . 152-155
The parish as a unit of secular government . . . 155-160
The Tudor legislation 155-156
The Elizabethan statutes as to the poor law . . 156-157
A rating unit 157-158
Takes the place of the older communities . . . 158-159
The Vestry 159-160
Reasons why the parish became a unit of secular government 160-163
(iv) Characteristics of the New System of Local Government 163-166
The English and the Continental developments . . 163-165
Conflict between the two ideas foreshadowed . . . 165-166
II. The Representative Assemblies and Central Courts of Law . 166-190
The representative assemblies of the Continent . . . 166-167
Reasons why they failed 167-173
Defects in their constitution 168
Hostility of the lawyers 168-169
The lawyers a rival power in Spain and France . 169-172
Way prepared for the sovereignty of the central government 172-173
The different evolution of the English Parliament . . . 173-174
Alliance of Parliament and the common lawyers . . . 174
Use made of Parliament by the Tudors 174
Development of Parliamentary procedure 174-178
Rules of debate 175-176
Position of the Speaker 176-177
Forms of legislation 177
Committees 178
Development of the idea of Privilege 178-180
Parliament and the justices of the peace 180-181
Results—Sir Thomas Smith's account 181-182
Why Parliament is spoken of as a court 182-183
Too much stress must not be laid on this fact . . . 183-184
It is a true legislative body 184-186
Coke and fundamental laws 186-187
The supremacy of Parliament and its effects—The rule of law 187-189
Parliament and the Council—divergent theories of government 189-190
The new position of the king and the new theory of the state . . 190-217
Mediæval theories as to the position of the king 190-191
Effects of the Renaissance and Reformation 192
Growth of theory of sovereignty 193-197

Bodin 193-194
His theory of sovereignty 194-195
Effect on men's conception of law and of the state . . . 195-196
Conflict with mediæval theories 196-199
Opposition on historical grounds—Hotman 197-
Opposition on analytical grounds—The *Vindiciæ contra Tyrannos* 197-199
Small effects of this opposition 199
Different position of the English king 199-202
How legal expression was given to his position 202-208
The king's natural and politic capacity 202-204
Inseparable prerogatives 204-206
His absolute and ordinary power 206-208
No clear ideas as to the whereabouts of the sovereign power in the state 208-209
Mediæval character of the theory of the state 209
Sir Thomas Smith and his book 209-212
Hooker and his book 212-214
The influence of continental speculations 215-217
III. The New Rules of Law—The Reception of Roman Law . . . 217-293
Need of this century for new law 217-218
No Reception in England 218
Importance of the continental Reception in English legal history . 218-219
Development of Roman Law on the Continent and the development of English Law 220-228
The Glossators 220-221
The contemporaneous English development 221-222
The Post-Glossators 222-223
The contemporaneous English development 223-225
The Renaissance jurists 225-228
Development of Roman Law in England 228-239
The teaching of civil and canon law in the middle ages . . 228-230
The sphere of action of the civilians and canonists . . . 230-232
Effects of the Reformation 232
Establishment of professorships of the civil law at the universities 232-233
Efforts to promote study of the civil law at the universities . . 233-235
Doctors' Commons 235-237
Place of the civil law in the English system 237-238
Analogies to and contrasts with the continental development . 239
Causes, extent, and manner of effecting the continental Reception . 240-252
Causes 240-246
Extent 246-250
Manner in which it was effected 250-252
Extent to which the development of English law was influenced by the Reception 252-289
Why this was a critical period for the common law . . . 253
(1) State of business in the common law courts 253-259
(2) The defects of the common law 259-262
(3) Cessation of the Year Books 262
But bulk of legal literature was the literature of the common law 262
Excellence of the teaching of the Inns of Court . . . 263
The independent self-government of the Inns . . 263-267
The activities of the Inns 267-268
The control of the Inns by the Council and the Judges . 268-270
Employment of common lawyers in the new courts and councils of this period 270-272
(4) Activity of the new courts and councils 272-283
The recognized sphere of the civil law 272-273
The sphere of action of the Council and Star Chamber . . 273-275
The sphere of action of the court of Chancery . . . 275-283
Equity and the canon law 275-276
The law of the Chancery and the common law . . 277-278

PAGE

The operative sphere of "conscience" 278-279
This idea takes new life in the Chancery . . . 279-281
Limits of its sphere of action 281-282
Growing definition of equity 282
Continued dependence of equity on the law . . . 282-283
Existence of the common law not in danger at this period . . 283
Policy of Henry VIII. 283
Position of Parliament 283-284
Its supremacy was in danger 284
Later conflicts of jurisdiction foreshadowed 284-285
No Reception needed in England 285-286
English lawyers turn to thirteenth century writers . . . 286
New courts introduce new ideas 286-287
Permanent effects of this 287-288
Comparison between the English and Continental development . 288
The Consequences of the Reception on the Continent and in England 289-293
Possibility of a science of comparative law 289
Possibility of international law 289-290
Effect on political discussion 290-291
Growth of national laws 291-292
Influence of Roman law on those laws 292
Debt of English to Roman law 292-293

CHAPTER II

English Law in the Sixteenth and Early Seventeenth Centuries

The Enacted Law

The enacted law and the professional development of the law . . . 294-295
The Proclamations 296-307
Henry VIII.'s statute 296
The case of Proclamations 296-297
The administration of the government 297-299
Matters religious 299-301
Commercial and industrial regulations 301-303
Social life 303-305
The Press 305-306
Miscellaneous 306-307
The Statutes 307-539
The printed editions 307-313
The statutes at large 308-310
Abridgments of the statutes 310-313
Commerce and Industry 314-407
Importance of this legislation 314-315
The economic ideas which underlie it 315-326
New geographical and political factors 315-316
The Mercantile System 316
The mediæval and the sixteenth century ideals . . . 316-319
Organization of external trade 319-321
Organization of internal trade 321-324
The mediæval and the sixteenth century system . . . 324-326
Trade external and internal 326-362
(i) The maintenance of an adequate system of national defence 327-331
(ii) The maintenance of an adequate stock of the precious metals 331-332
(iii) The promotion of foreign trade 332-340
Cessation of foreign control 332-333
Regulation of imports and exports 333-335
Regulation by the prerogative 335-338
Impositions—their legality not questioned in this period 336-338
Colonization 338-340

PAGE

(iv) Preservation of old, and encouragement of new industries 340-354
Competency of the workmen 341-342
Quality of the product 342-343
Encouragement of new industries 343-354
Monopoly patents—origin 343-345
Different from mediæval gild privileges 345-346
Abuse of monopolies 346-347
Parliamentary agitation against them 347-348
Elizabeth's settlement 348-349
Attitude of the common law 349-350
When will a monopoly or other restriction on trade be valid 350-353
James I.'s statute 353-354
Later development of patent law 354
(v) Enforcement of this commercial policy 355-361
Various expedients 355-356
Actions for penalties 356-357
Commissions to seek out offenders and to compound offences 357-359
Special officials 359-360
Break down of these expedients under the Stuarts . . 360-361
Success of Tudor commercial policy 361
Effect on growth of commercial law 361-362
Agriculture, the food supply, and prices 362-379
The agricultural problem 362-363
(i) The Agrarian Revolution 364-373
Inclosures for pasture and tillage 364-365
Legislation against inclosure for pasture . . . 365-368
Inclosure for tillage 368-369
Encouragement to agriculture 370-371
Labour for agriculture 371
The business of agriculture 371-372
The achievements of the new race of landowners . . 372-373
(ii) The food supply and prices 373-379
The aims of the government 373-374
Its measures 374-375
Rules of law under which it acted 375-379
Forestalling, regrating, and ingrossing 375-377
Enforcement of the law on these topics 377-379
Effects of the repeal of this legislation 379
Employer and workmen 379-387
The Statutes of Labourers and the Elizabethan legislation . 380
Duty to work 380-381
Rates of wages 381-383
Infringements of the Acts 383
Procuring a departure from service 383
Modern developments of the law on this point . . 384-385
General view of the Elizabethan law 385-386
Modern changes and their effects 387
Unemployment and pauperism 387-402
Mediæval and sixteenth century conditions 387-388
Mediæval agencies for relief of pauperism 389-390
The Statutes of Labourers 390
Need for new measures 391-392
The principles which the legislature adopted 392-395
Houses of correction 395-396
The statutes which gave effect to these principles . . 396-399
Relief of the poor 397
Punishment of rogues 397-398
Foundation of hospitals 398
Charitable Trusts 398-399
Relief of soldiers and mariners 399
This code is the logical result of the Tudor commercial policy 399-400

	PAGE
Why the Poor Law succeeded in England	400-401
Its social and political effects	401-402
Classes of Society	402-407
Modification of mediæval ideas	402-403
Rise of a large middle class	403-404
Position of the lower classes	404
The pauper	404-405
Duties of all classes to the state	405
Class distinctions	405-406
No impassable class barriers	407
Uses and Trusts	407-480
Property and contract—peculiarity of English developments	407
Influence of these developments on English law, public and private	408
Historical development of the law as to Uses	409
The Use in the Middle Ages	409-449
Origins and position in English law	410-417
Earlier theories	410
The Salman—the underlying idea	410-412
Instances	412
Twelfth and thirteenth century developments	412-414
Period of uncertainty as to position of the Use	414-416
Uses of land not recognized by the common law	416
Effects of this	417
Development in the Chancery	417-443
Why the Chancery assumed jurisdiction	418-419
When it assumed this jurisdiction	419-420
Why Uses of land are most common	420-421
The Creation of the Use	421-427
Express creation	421-423
By operation of law	423-424
Implied from acts of parties	424-427
Capacity to be feoffee or cestuique use	427-430
Position of feoffees to use	430-431
The interest of the cestuique use	432-437
Becomes almost a jus in rem	432-433
Peculiar nature of this interest	433-435
Its practical results	435-437
Incidents of the estate of cestuique use	437-443
How far equity followed the law	437-438
Increased powers of landowners	438-439
The property of unincorporate communities	439-440
New estates in the land made possible	440-441
Risk of perpetuities not yet felt	441
Effect on conveyancing	442
Why legislative control was necessary	442-443
Control by the Legislature	443-449
Legal purposes	443
Illegal purposes	443-446
Evasion of the incidents of tenure	446-449
The Statute of Uses	449-473
Misunderstanding of its causes and effects	449-450
Its political causes	450-461
Henry VIII.'s unsuccessful attempts to legislate	450-453
He conciliates the lawyers	453-455
New legislative proposals	455-456
The alternative scheme	456-457
The more complete scheme of the Statute of Uses	457
Proposals as to registration of conveyances	457-459
Their failure and the effects of this failure	459-460
The Statute of Enrolments	460
The preamble to the Statute of Uses—its real character	460-461
The Statute and its immediate consequences	461-467
Its governing idea—§§ 1 and 2	461-462

PAGE

Other clauses 462
The Statute of Enrolments 462
To what uses the Statute applied 463
Advantages gained by the king and the common lawyers 464
Its unpopularity—the Pilgrimage of Grace . . 464-465
The Wills Acts 465-466
Effects of this legislation 466-467
How far the Statute accomplished its objects . . . 467-473
Mistaken ideas of modern writers 467
Its four objects 467-468
The use upon a use 468-473
The Use at Common Law and the Equitable Trust . . 473-480
Increased powers of landowners 473
Perpetuities 474
The new interests in land 474-475
Improved machinery of conveyancing 475
Good and bad results 475-476
Influence of the equitable trust 476-480
On Chattels personal 476-
On Family law 476-477
On public and semi-public law 477-480
The Land Law 480-488
Prevention of frauds on creditors, etc. 480-483
Conveyancing 483
Doctrines relating to seisin 483-484
The limitation of real actions 484-486
The interest of the termor 486-487
Landlord and tenant 487
Forcible entry 487-488
Ecclesiastical Law 488-492
Status of the clergy 489
Clerical discipline 489
Ecclesiastical property 489-490
The marriage laws 490-492
Testamentary jurisdiction 492
Criminal Law and Procedure 492-532
(1) Treason 492-500
The statutes of temporary importance 493-496
The statutes of more permanent interest . . . 496-498
Non-political treasons 498
Procedure in treason trials 498-500
Consequences of conviction 500
The statute of 1494 500
(2) Felony 501-512
Extensions of the older felonies 501-503
Forgery 501-503
The new felonies 503-512
Riots 503
Damage to Property 503-504
Immorality 504
Abduction 504-505
Hunting and Game 505-506
Religion 506-511
Witchcraft 507-511
Miscellaneous 511-512
(3) Misdemeanour 512-521
Growth of the idea of misdemeanour . . . 512-513
The characteristics of the misdemeanours . . 513-514
Offences against person and property . . . 514
Offences against morals 514-515
Perjury 515-519

PAGE

Offences connected with officials 520
Offences connected with abuse of procedure . . 520-521
(4) Topics connected with criminal law and procedure . 521-531
The substantive law 521-523
The hue and cry 521-522
Market overt 522
Other statutory changes 522-523
Procedure 523-531
Changes which gave advantages to the crown . 523-524
Changes which gave advantages to the subject 525
Changes which made for greater efficiency in the law 525-531
Bail 525-528
Preliminary examination of the accused . 528-530
Venue 530-531
Formal errors in indictments . . . 531
Summary 531-532
Civil Procedure 532-539
Limitation of actions 533
Other subjects connected with procedure 533-539
Process 534-535
Pleading 535-536
Proceedings in error 536
Costs 536-538
Judicial machinery 538-539
General characteristics of this collection of statutes . . . 539-540

APPENDIX

I. The Justices of the Peace 541-568
(1) The Contents of Lambard's Eirenarcha 541-543
(2) The Articles of the Charge given by the Justices of the Peace at Quarter Sessions 543-568

II. The Will and Two Codicils of Roger Flore of London and Oakham giving Directions to the Feoffees to Uses of the Testator's Lands 568-572

III. Documents connected with the Statute of Uses 572-586
(1) The Draft Bill of 1529 572-574
(2) The Agreement between the King and the Nobility . . 574-577
(3) The Evil Consequences of Uses 577-580
(4) The proposed Alternative to the Statute of Uses . . . 580-581
(5) The proposed Statute of Enrolments 582-586

INDEX 587-600

LIST OF CASES

PAGE

Abbot of Bury v. Bokenham 427, 433, 440, 442
Abbot of Peterborough v. Power 128
Adams and Bafeald's Case . . 383
Admiralty, Case of the . . . 524
Andrews v. Barnes . . . 536
Arundell v. Berkeley . . . 421
Assaby v. Manners . . . 426
Attorney-General v. Archer . . 377
Attorney-General v. Bent . . 85
Attorney-General v. Duke of Richmond 447
Attorney-General v. Forkesey . 370
Attorney-General v. Fowkes . . 377
Attorney-General v. Hammond . 498
Attorney-General v. Hillyard . 85
Attorney-General v. Jupp . 356, 360
Attorney-General v. Rowe . . 77
Attorney-General v. Sampson . 360
Attorney-General v. Taylor . . 377
Attorney-General v. Taylor and Stevenson 498
Attorney-General v. Yeomans . 360
Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Company . . . 350

B

Bakers, Brewers and others of Andover v. Knyght . . . 190
Basset's Case 474
Bates's Case . 205, 207, 336, 337, 338
Bayneham v. Grymes . . . 360
Beauchamp, Lord, v. Sir R. Crofts 517
Bevil's Case 484, 485
Bingham's Case 452
Bircot's Case 351
Blake v. Lanyon . . . 384, 385
Blood v. Lee 538
Bonham's Case . . 186, 323, 403
Brent's Case . . . 423, 429, 450
Brook v. Brook . . . 491, 492
Bullivant v. Attorney-General for Victoria 447

PAGE

Cadogan v. Kennett . . . 482
Callard v. Callard . . . 426, 431
Calvin's Case . 173, 183, 186, 201, 203, 209, 277
Caudrey's Case 206
Cavendish's Case 202
Chamberlain of London's Case 158, 352
Chudleigh's Case 183, 186, 275, 410, 432, 433, 445
Churchwardens of Northampton's Case 153
City of London's Case . . 346, 351
Clark's Case 352
Clothworkers of Ipswich's Case . 352
Colville v. Parker 481
Commissioners for Special Purposes of Income Tax v. Pemsel . 398, 399
Cooper v. Franklin 429
Corbet's Case . 429, 437, 438, 440, 471
Core's Case 412
Crane v. Hawks 498
Cromwell's Case 429

D

Dacre, Lord, Trial of . . 126
Damport v. Sympson . . 519
Danvers v. Broket . . . 502
Darcy v. Allen or Allin 346, 349, 350, 351, 352, 358
Davenant v. Hurdis . . 352
Davison's Case . . 68, 85
Dawson v. Fowle . . . 153
Delamere v. Barnard . 433, 445, 446
Digge's Case . . . 474, 475
Dillon v. Freine or Fraine 410, 429, 470, 471
Doe v. Manning 482
Dowtie's Case 500
Duchy of Lancaster, Case of the . 202

E

Edlyngton v. Everard . . . 422
Ellowe and Others v. Thomas Taylor 439
Eyres v. Sedgewick . . . 519

F

PAGE

Felbrigge v. Damme . . . 435
Ferrers's Case . . . 91, 201
Foster's Case 524
Freeman v. Pope 481

G

General Assembly of the Free Church of Scotland v. Lord Overton 479
Germane Ciol, Case of . . . 338
Godwyne v. Profyt 420

H

Hall, Arthur, Case of . . 91, 93
Harcourt v. Fox 149
Harding v. Pollock . . . 149, 150
Hart v. Aldridge 384
Heyward's Case 460
Hill v. Hill 421
Holloway v. Pollard . . 469, 472
Hunt v. Burn 485

I

Inglis v. Haigh 533

J

Jeffrey's Case 153, 158
Jenkins v. Jones 521
Jenkins v. Keymis 482
Jenkins v. Young 462
Jenning's Case 482
Jones v. Pope 533

K

King's Prerogative in Saltpetre, Case of the 205, 331, 352
Knightley's Case 100

L

Lampet's Case 472
Lavenden v. Blackstone . . . 482
Lincoln College's Case . . . 482
Lumley v. Gye . . . 384, 385
Lutwich v. Mitton . . . 460, 468
Lyte et Uxor v. Peny . . 413, 420

M

Manning and Andrew's Case . . 441
Mathey's Patent, Case of . . 351
Mayor of Colchester v. Goodwin . 319
Mercer, Ex parte 481
Milborn v. Ferrers 469
Mines, Case of 206
Mitton's Case 149
Monopolies, Case of . . 349, 352
Munford v. Pait 538

N

PAGE

Newson v. Bawldry . . 153, 158
Non Obstante, Case of . . . 205
Norfolk, Case of the County of . 95

O

Onslowe's Case 518
Oxford, Case of the Earl of . . 280

P

Parishioners of Radclyffe Bristowe v. Mayor of Bristowe . . . 155
Partridge v. Strange . . . 521
Penal Statutes, Case of . . 204, 358
Peverall v. Huse 422
Phillibrown v. Ryland . . 155, 159
Planche v. Fletcher . . . 447
Polgrenn v. Feara 435
Porter's Case (1592) . 98, 444, 478
Porter's Case (1637) . . . 504
Prior of St. John's v. Clyffe . . 435
Proclamations, Case of . . 202, 296

R

Raleigh, Trial of Sir Walter . . 499
Ralph Bovy's Case 482
Regnier v. Fogossa 99
R. v. Berchet 258
R. v. Broadfoot 329
R. v. Chadwick 492
R. v. Griepe 519
R. v. Macdaniel 517
R. v. Morgan Rees . . . 153, 155
R. v. St. Giles in the Fields . . 490
R. v. Whitbread and Fenwick . 499
Robert Pilfold's Case . . . 537
Robinson v. Alexander . . . 533
Robinson v. Giffard . . . 482
Rogers v. Davenant . . 153, 155
Rolfe v. Hampden 422
Rothendale v. Wychingham . . 420

S

Saundre v. Gaynesford . . 431, 432
Sharington v. Strotton . . . 426
Ship Money, Case of . 206, 207, 216
Shirley's Case 535
Soldiers, Case of 330
Somerton's Case . . . 136, 418
Stafford's Case 482
Standish's Case 91
Standon v. Bullock . . . 481
Starkey v. Barton . . . 153, 155
Story's Case 524
Strafford, Impeachment of . . 499
Strickland's Case . . . 92, 99
Strode's Case 91

T

	PAGE
Talbot v. Cookes	128
Talory v. Jackson	533
Throckmorton's Case	498
Twyne's Case	481
Tyne's Case	426
Tyrrel's Case	430, 469, 470, 471, 472
Tyte v. Globe	537

V

Vane, Trial of	500

W

	PAGE
Webber v. Tivil	533
Wentworth, Peter, Case of	92, 99
Whitton v. Crompton	484
Wilflete v. Cassyn	420
Willion v. Berkeley	184, 203, 207, 427
Wimbish v. Talbois	471
Winchester's Case	471
Wingfield v. Littleton	425
Woodie's Case	481
Woodward v. Makepeace	153

LIST OF STATUTES

	PAGE
52 Henry III. c. 6	537
3 Edward I. St. 1 c. 15	141, 526
6 „ „ c. 1	537
13 „ „ St. 2	123, 521, 537
3 Edward II. c. 4	443
2 Edward III. c. 3	123, 138
„ „ „ c. 7	123
4 „ „ c. 2	527
„ „ „ c. 10	123
9 „ „ c. 14	123
11 „ „ c. 5	344
23 „ „ c. 1	123
25 „ „ St. 1	123
„ „ „ St. 4 c. 3	375
27 „ „ St. 2 c. 11	375
28 „ „ c. 11	521
„ „ „ c. 13	375
34 „ „ c. 1	527
36 „ „ c. 2	123
50 „ „ c. 6	443
1 Richard II. c. 9	444
2 „ „ St. 2 c. 3	443
5 „ „ St. 1 c. 7	138
11 „ „ c. 3	423
12 „ „ c. 3	123, 383, 390
„ „ „ c. 6	139
„ „ „ c. 7	390
„ „ „ c. 10	150
13 „ „ St. 1 c. 13	505
15 „ „ c. 2	138, 140
„ „ „ c. 5	444
17 „ „ c. 7	374
2 Henry IV. c. 15	509
4 „ „ c. 6	498
„ „ „ c. 7	444
5 „ „ c. 1	423
7 „ „ cc. 5, 12	423
11 „ „ c. 4	123
13 „ „ c. 7	134, 140
1 Henry V. c. 3	503
2 „ „ c. 4	147
„ „ „ c. 8	140
8 Henry VI. c. 9	134, 487
„ „ „ c. 14	140
11 „ „ c. 3	444
14 „ „ c. 5	374
15 „ „ c. 2	374
„ „ „ c. 6	322
18 Henry VI. c. 19	330
23 „ „ c. 9	527
„ „ „ c. 12	383
1 Edward IV. c. 1	423
2 „ „ c. 3	335
2, 3 „ „ c. 2	139
3 „ „ c. 2	374
4 „ „ c. 1	134
7 „ „ c. 3	334
17 „ „ c. 1	332
„ „ „ c. 4	134
1 Richard III. c. 1	444, 453
„ „ „ c. 3	527
„ „ „ c. 5	461
„ „ „ c. 9	335
„ „ „ c. 11	330
1 Henry VII. c. 1	444
„ „ „ c. 2	489
„ „ „ c. 7	139
„ „ „ c. 8	327, 505, 506
„ „ „ c. 9	335
3 „ „ c. 1	518, 520, 523
„ „ „ c. 2	504
„ „ „ c. 3	527
„ „ „ c. 4	141
„ „ „ c. 5	443
„ „ „ c. 8	332
„ „ „ c. 10	323, 537
„ „ „ c. 11	334
„ „ „ c. 16	428
4 „ „ c. 1	370
„ „ „ cc. 8, 9	377
„ „ „ c. 10	327, 328
„ „ „ c. 11	334
„ „ „ c. 16	365
„ „ „ c. 17	448
„ „ „ c. 19	365, 369, 498
„ „ „ c. 23	332
„ „ „ c. 24	483
7 „ „ c. 1	330
„ „ „ c. 7	336
11 „ „ c. 1	500
„ „ „ c. 2	155, 156, 391, 394, 399
„ „ „ c. 4	142, 515
„ „ „ c. 7	520
„ „ „ c. 10	26
„ „ „ c. 12	539

			PAGE
11 Henry VII.		c. 13	330
,,	,,	c. 15	139, 141, 520
,,	,,	c. 17	506
,,	,,	c. 19	343
,,	,,	c. 20	484
,,	,,	c. 21	517
,,	,,	c. 22	380
,,	,,	c. 24	517
,,	,,	c. 25	518
12	,,	c. 3	380
,,	,,	c. 5	142
,,	,,	c. 6	323
19	,,	c. 4	330
,,	,,	c. 7	323
,,	,,	c. 9	534
,,	,,	c. 11	506
,,	,,	c. 12	125, 391, 394, 399
,,	,,	c. 13	140
,,	,,	c. 14	520
,,	,,	c. 15	428, 443, 449
,,	,,	c. 19	342, 356
,,	,,	c. 21	335
,,	,,	c. 23	333
22	,,	c. 4	323
28	,,	c. 5	323
1 Henry VIII.		c. 8	520
,,	,,	c. 14	406
3	,,	c. 3	330
,,	,,	c. 5	330
,,	,,	c. 6	322, 342, 356
,,	,,	c. 7	334
,,	,,	c. 8	377
,,	,,	c. 9	514
,,	,,	c. 10	322, 342
,,	,,	c. 13	330
,,	,,	c. 16	439
4	,,	c. 5	380
,,	,,	c. 8	91
5	,,	c. 3	334
,,	,,	c. 4	322, 341, 342
6	,,	c. 1	406
,,	,,	c. 2	330
,,	,,	c. 3	380
,,	,,	c. 5	365
,,	,,	c. 6	539
,,	,,	c. 11	330
,,	,,	c. 12	334
,,	,,	c. 13	330
,,	,,	c. 16	94
7	,,	c. 1	365, 369
,,	,,	c. 2	327
,,	,,	c. 3	525
,,	,,	c. 5	380
,,	,,	c. 6	406
14, 15	,,	c. 5	403
,,	,,	c. 7	330
,,	,,	c. 10	129, 506
21	,,	c. 3	536
,,	,,	c. 4	483
,,	,,	c. 5	492
,,	,,	c. 7	501
,,	,,	c. 10	331, 334
21 Henry VIII.		c. 11	523
,,	,,	c. 12	321
,,	,,	c. 13	489
,,	,,	c. 15	486
,,	,,	c. 21	343
,,	,,	c. 23	439
,,	,,	c. 24	104
22	,,	c. 1	334
,,	,,	c. 5	142
,,	,,	c. 7	330
,,	,,	c. 9	492
,,	,,	c. 10	139
,,	,,	c. 11	504
,,	,,	c. 12	125, 139, 155, 156, 158, 391, 394
,,	,,	c. 14	139
23	,,	c. 2	142
,,	,,	c. 3	517
,,	,,	c. 4	98, 322, 343, 356
,,	,,	c. 5	370
,,	,,	c. 7	327
,,	,,	c. 10	440, 444
,,	,,	c. 14	534
,,	,,	c. 15	538
24	,,	c. 1	321, 322, 342, 356
,,	,,	c. 2	343
,,	,,	c. 3	377
,,	,,	c. 4	330
,,	,,	c. 5	523
,,	,,	c. 8	538
,,	,,	c. 10	122, 129, 155
,,	,,	c. 12	283
,,	,,	c. 13	122, 129, 406
,,	,,	c. 22	491
25	,,	c. 2	377
,,	,,	c. 5	341
,,	,,	c. 6	504
,,	,,	c. 9	322, 335, 343
,,	,,	c. 13	365, 366, 369
,,	,,	c. 15	335
,,	,,	c. 17	330
,,	,,	c. 21	186
,,	,,	c. 22	493, 496
26	,,	c. 10	336
,,	,,	c. 13	423, 460, 494, 496, 500
,,	,,	c. 16	497
27	,,	c. 1	317
,,	,,	c. 4	523
,,	,,	c. 10	409, 428, 449, 461
,,	,,	c. 12	342, 356
,,	,,	c. 13	334
,,	,,	c. 15	488
,,	,,	c. 16	462
,,	,,	c. 17	501
,,	,,	c. 20	490
,,	,,	c. 22	365
,,	,,	c. 24	37, 127
,,	,,	c. 25	125, 155, 156, 391-5
,,	,,	c. 26	38, 127
,,	,,	c. 28	500

	PAGE
28 Henry VIII. c. 7	491, 494, 496
,, ,, ,, c. 8	331
,, ,, ,, c. 10	494
,, ,, ,, c. 15	260, 523
,, ,, ,, c. 16	491
,, ,, ,, c. 49	203
31 ,, ,, c. 1	483
,, ,, ,, c. 2	505
,, ,, ,, c. 7	331
,, ,, ,, c. 8	102, 103, 207, 492
,, ,, ,, c. 10	66
,, ,, ,, c. 13	465, 500
,, ,, ,, c. 14	506
32 ,, ,, c. 1	465
,, ,, ,, c. 2	484
,, ,, ,, c. 7	142, 490
,, ,, ,, c. 8	506
,, ,, ,, c. 9	521
,, ,, ,, c. 11	505
,, ,, ,, c. 13	123, 129
,, ,, ,, c. 14	327
,, ,, ,, c. 18	317
,, ,, ,, c. 19	317, 518
,, ,, ,, c. 25	494
,, ,, ,, c. 28	484, 486
,, ,, ,, c. 30	535
,, ,, ,, c. 31	482
,, ,, ,, c. 32	483
,, ,, ,, c. 33	483
,, ,, ,, c. 34	487
,, ,, ,, c. 36	483
,, ,, ,, c. 37	487
,, ,, ,, c. 38	491
,, ,, ,, c. 46	466
33 ,, ,, c. 1	514
,, ,, ,, c. 6	129
,, ,, ,, c. 7	334
,, ,, ,, c. 8	510
,, ,, ,, c. 9	129, 139, 330
,, ,, ,, c. 10	146
,, ,, ,, c. 14	511
,, ,, ,, c. 17	129
,, ,, ,, c. 19	334
,, ,, ,, c. 20	500
,, ,, ,, c. 21	493
,, ,, ,, c. 23	523, 524
,, ,, ,, c. 29	489
,, ,, ,, c. 36	317
34, 35 ,, ,, c. 2	520
,, ,, ,, c. 5	466
,, ,, ,, c. 6	343, 356
,, ,, ,, c. 10	321, 322, 343
,, ,, ,, c. 20	482, 500
,, ,, ,, c. 22	486
,, ,, ,, c. 23	102, 103
,, ,, ,, c. 24	93
,, ,, ,, c. 26	38, 127
35 ,, ,, c. 1	494
,, ,, ,, c. 2	524
,, ,, ,, c. 3	495, 497
,, ,, ,, c. 4	317
,, ,, ,, c. 6	538

	PAGE
35 Henry VIII. c. 12	104
,, ,, ,, c. 16	488
,, ,, ,, c. 17	141, 330, 369
36 ,, ,, cc. 8, 9	317
37 ,, ,, c. 1	149, 150
,, ,, ,, c. 4	523
,, ,, ,, c. 6	504, 513
,, ,, ,, c. 7	146
,, ,, ,, c. 8	531
,, ,, ,, c. 10	511
,, ,, ,, c. 15	334
,, ,, ,, c. 17	488
1 Edward VI. c. 1	506
,, ,, ,, c. 3	125, 156, 391, 393-5
,, ,, ,, c. 5	330
,, ,, ,, c. 7	534
,, ,, ,, c. 12	104, 492-501, 504, 506, 510, 511
,, ,, ,, c. 14	98, 323
2, 3 ,, ,, c. 1	506
,, ,, ,, c. 2	139, 330
,, ,, ,, c. 8	539
,, ,, ,, c. 10	129, 141
,, ,, ,, c. 11	322, 342
,, ,, ,, c. 13	490
,, ,, ,, c. 15	129, 323, 377
,, ,, ,, c. 19	328
,, ,, ,, c. 24	530
,, ,, ,, c. 37	331
3, 4 ,, ,, c. 1	149
,, ,, ,, c. 2	142, 322
,, ,, ,, c. 3	364
,, ,, ,, c. 5	76, 503, 513
,, ,, ,, c. 11	488
,, ,, ,, c. 15	511
,, ,, ,, c. 16	125, 156, 383, 390, 393, 394
,, ,, ,, c. 17	506
,, ,, ,, c. 19	395
5, 6 ,, ,, c. 1	506
,, ,, ,, c. 2	156, 393
,, ,, ,, c. 5	365
,, ,, ,, c. 6	322, 342, 356
,, ,, ,, c. 7	334
,, ,, ,, c. 8	341
,, ,, ,, c. 11	497, 499, 500
,, ,, ,, c. 12	489
,, ,, ,, c. 13	489
,, ,, ,, c. 14	141, 374-6
,, ,, ,, c. 16	520
,, ,, ,, c. 18	328
,, ,, ,, c. 24	341
,, ,, ,, c. 25	515
7 ,, ,, c. 2	100
,, ,, ,, c. 5	122, 129, 144, 377
,, ,, ,, c. 6	332, 511
,, ,, ,, c. 7	140
1 Mary St. 1 c. 1	501
,, ,, Sess. 1 c. 1	495, 497, 504, 510
,, ,, St. 2 c. 1	491
,, ,, ,, c. 2	489

			PAGE
1 Mary St. 2	c.	3	142
,, ,, ,,	c.	12	76, 138
,, ,, Sess. 2	c.	6	498
,, ,, ,,	c.	11	334
,, ,, ,,	c.	12	497, 503
,, ,, Sess. 3	c.	1	200
,, ,, ,,	c.	12	370
1, 2 Philip and Mary	c.	2	406
,, ,, ,,	c.	3	511
,, ,, ,,	c.	4	139, 493, 511
,, ,, ,,	c.	5	374
,, ,, ,,	c.	8	491
,, ,, ,,	c.	9	493
,, ,, ,,	c.	10	493, 497-500, 524
,, ,, ,,	c.	11	498
,, ,, ,,	c.	12	487
,, ,, ,,	c.	13	139, 141, 527, 529
,, ,, ,,	c.	14	341, 343
2, 3 ,, ,,	c.	2	365
,, ,, ,,	c.	3	156
,, ,, ,,	c.	5	393
,, ,, ,,	c.	7	522
,, ,, ,,	c.	8	129
,, ,, ,,	c.	10	139, 529
,, ,, ,,	c.	11	323, 341
,, ,, ,,	c.	16	140
,, ,, ,,	c.	19	504
4, 5 ,, ,,	c.	3	129, 330
,, ,, ,,	c.	7	538
,, ,, ,,	c.	8	505, 514
1 Elizabeth	c.	1	490
,, ,,	c.	2	140, 507
,, ,,	c.	5	495, 499
,, ,,	c.	6	511
,, ,,	c.	8	342
,, ,,	c.	9	335, 342
,, ,,	c.	10	335
,, ,,	c.	12	356
,, ,,	c.	13	328
,, ,,	c.	15	330
,, ,,	c.	16	76, 138
,, ,,	c.	17	129
5 ,,	c.	1	81, 129
,, ,,	c.	2	365
,, ,,	c.	3	156, 393
,, ,,	c.	4	141, 144, 147, 341, 371, 380, 382, 383
,, ,,	c.	5	328, 330, 374
,, ,,	c.	6	406
,, ,,	c.	7	334
,, ,,	c.	8	322, 342
,, ,,	c.	9	518
,, ,,	c.	10	501
,, ,,	c.	11	498
,, ,,	c.	12	144, 374
,, ,,	c.	13	139, 156
,, ,,	c.	14	139, 501, 502, 513
,, ,,	c.	15	511
,, ,,	c.	16	510
,, ,,	c.	17	504
5 Elizabeth	c.	19	330
,, ,,	c.	21	504, 506
8 ,,	c.	2	538
,, ,,	c.	4	514
,, ,,	c.	6	334
,, ,,	c.	11	342
,, ,,	c.	12	342
,, ,,	c.	13	330
,, ,,	c.	15	157
,, ,,	c.	17	330
13 ,,	c.	1	495
,, ,,	c.	2	140
,, ,,	c.	5	374, 480
,, ,,	c.	9	142
,, ,,	c.	13	374
,, ,,	c.	14	330
,, ,,	c.	15	328
,, ,,	c.	19	122, 129, 335
,, ,,	c.	25	140-142
,, ,,	c.	27	141
14 ,,	c.	1	497
,, ,,	c.	2	500
,, ,,	c.	3	498
,, ,,	c.	5	125, 142, 144, 156, 157, 160, 391-395, 511
,, ,,	c.	6	481
,, ,,	c.	8	482
18 ,,	c.	1	498
,, ,,	c.	3	141, 144, 147, 341, 371
,, ,,	c.	4	161
,, ,,	c.	5	357
,, ,,	c.	7	504
,, ,,	c.	10	157
,, ,,	c.	12	539
,, ,,	c.	14	536
23 ,,	c.	1	140, 482, 495
,, ,,	c.	2	483, 511
,, ,,	c.	7	328
,, ,,	c.	8	326, 343, 356
,, ,,	c.	9	326, 343
,, ,,	c.	10	129, 139, 506
27 ,,	c.	3	521
,, ,,	c.	4	481
,, ,,	c.	5	536
,, ,,	c.	7	538
,, ,,	c.	10	357
,, ,,	c.	11	139
,, ,,	c.	12	141
,, ,,	c.	13	125, 142, 522
,, ,,	c.	14	140
,, ,,	c.	19	330
28, 29 ,,	c.	3	482
,, ,,	c.	6	482
29 ,,	c.	2	536
,, ,,	c.	4	520
31 ,,	c.	2	483
,, ,,	c.	3	534
,, ,,	c.	4	501
,, ,,	c.	5	357, 525
,, ,,	c.	6	489
,, ,,	c.	7	129, 369
,, ,,	c.	11	138, 488

			PAGE
31 Elizabeth	c.	12	522
35 „	c.	1	140, 507
„ „	c.	2	142, 507
„ „	c.	4	158, 399
„ „	c.	6	513
„ „	c.	7	365, 374, 394
„ „	c.	10	326, 342
„ „	c.	11	330
39 „	c.	1	366, 369
„ „	c.	2	366
„ „	c.	3	141, 144, 151, 156
„ „	c.	4	125, 139, 140, 141, 144, 157
„ „	c.	9	505
„ „	c.	10	328
„ „	c.	12	144, 382
„ „	c.	14	334
„ „	c.	16	140, 142
„ „	c.	17	140
„ „	c.	18	142
„ „	c.	20	322, 326, 342
„ „	c.	21	158, 161
39, 40 „	cc.	1, 2	399
„ „	c.	3	396
„ „	c.	4	396, 511
„ „	cc.	5, 6	398
„ „	cc.	17, 21	399
43 „	c.	2	139, 141, 144, 151, 156, 397
„ „	c.	3	139, 144, 158, 161, 399
„ „	c.	4	398
„ „	c.	5	539
„ „	c.	6	520
„ „	c.	7	139, 514
„ „	c.	8	492
„ „	c.	9	366
„ „	c.	10	326, 342
„ „	c.	18	141
1 James I.	c.	3	490
„ „ „	c.	4	507
„ „ „	c.	5	129
„ „ „	c.	6	142, 147
„ „ „	c.	7	141, 398
„ „ „	c.	9	139, 515
„ „ „	c.	10	539
„ „ „	c.	11	504
„ „ „	c.	13	535
„ „ „	c.	14	539
„ „ „	c.	16	323
„ „ „	c.	17	342
„ „ „	c.	20	343
„ „ „	c.	23	328
„ „ „	c.	24	330
„ „ „	c.	25	139, 140, 144, 366, 374, 406, 489
„ „ „	c.	27	141, 144, 506
„ „ „	c.	29	328
„ „ „	c.	31	141, 161
„ „ „	c.	32	342
„ „ „	c.	33	333
3 „ „	c.	1	334
„ „ „	c.	4	507, 531
3 James I.	c.	5	142
„ „ „	c.	6	350
„ „ „	c.	7	538
„ „ „	c.	8	535
„ „ „	c.	9	323
„ „ „	c.	13	506
„ „ „	c.	14	370
„ „ „	c.	15	539
„ „ „	c.	16	342
„ „ „	c.	18	370
„ „ „	c.	20	370
4 „ „	c.	2	342
„ „ „	c.	3	538
„ „ „	c.	5	129, 139, 515
„ „ „	c.	6	342
„ „ „	c.	8	370
„ „ „	c.	9	350
„ „ „	c.	11	368
„ „ „	c.	12	370
„ „ „	c.	13	370
7 „ „	c.	3	141, 398
„ „ „	c.	4	398
„ „ „	c.	5	524
„ „ „	c.	6	507
„ „ „	c.	7	342
„ „ „	c.	10	139, 515
„ „ „	c.	11	139, 141, 506
„ „ „	c.	12	533
„ „ „	c.	16	342
„ „ „	c.	17	514
„ „ „	c.	20	370
21 „ „	c.	1	398
„ „ „	c.	2	484
„ „ „	c.	3	331, 353
„ „ „	c.	5	525
„ „ „	c.	7	515
„ „ „	c.	8	528
„ „ „	c.	9	342
„ „ „	c.	10	38
„ „ „	c.	12	524
„ „ „	c.	13	536
„ „ „	c.	15	488
„ „ „	c.	16	485, 533
„ „ „	c.	18	342
„ „ „	c.	20	514
„ „ „	c.	21	122, 129
„ „ „	c.	22	376
„ „ „	c.	24	535
„ „ „	c.	25	487
„ „ „	c.	28	366, 374, 523
„ „ „	c.	31	323
„ „ „	c.	32	370
1 Charles I.	c.	1	514
„ „ „	c.	4	515
3 „ „	c.	2	514
„ „ „	c.	4	515
16 „ „	c.	5	329
„ „ „	c.	19	360
13, 14 Charles II.	c.	12	124
1 William and Mary Sess. 1	c.	21	149
4 „ „ „	No.	31	368
7 William III.	c.	3	499

	PAGE
1 George I. St. 2 c. 5	129
9 George II. c. 36	398
53 George III. c. 40	387
54 ,, ,, c. 96	342
3 George IV. c. 41	328
6 ,, ,, c. 129	379
3, 4 William IV. c. 27	485, 486, 532
7, 8 Victoria c. 24	379
8, 9 Victoria c. 106	475
19, 20 ,, c. 64	366
31, 32 ,, c. 45	328
37, 38 ,, c. 57	532
56, 57 ,, c. 21	482
63, 64 ,, c. 51	379
7 Edward VII. c. 47	492

BOOK IV

(1485-1700)

THE COMMON LAW AND ITS RIVALS

A HISTORY OF ENGLISH LAW

INTRODUCTION

ENGLISH law owes as much to the narrowness of the English Channel as to its existence; for, if the existence of the English Channel has helped our law to a continuous and a native development, its narrowness has enabled it to share, in some measure, the intellectual and political life of the continent. In fact, this continuous native development would hardly have been possible if England at critical periods in her history had not come under some of the same legal, political, and religious influences as were experienced by the rest of Western Christendom. The compact territories and remote situation of countries in the far east of Europe like Hungary or Poland caused them to be less directly affected by these influences. They were not subject to the constant pressure from without that was experienced by the states of Western Europe with their more scattered dominions; and so they stood self-centred upon the ancient ways, and preserved their mediæval forms of law and government. They paid the penalty. In the sixteenth century Hungary was left defenceless against the Turk; and in later days Poland found itself equally defenceless against the states of Western Europe, which, under these newer influences, had organized themselves under strong governments able to command force sufficient not only to keep the peace at home, but also to extend the boundaries of their states by successful foreign war.[1] Such events as the battle of Mohacz and the partitions of Poland are a standing warning against a national complacency which refuses to look abroad and face the task of levelling up institutions and laws to the standard demanded by a changed world.

England has been more fortunate than these countries; for, though in many ways standing apart from the continent, she has, ever since the Norman Conquest, always played a part both in its

[1] Cambridge Modern History i 342-346.

intellectual life and in its wars, alliances, and diplomacy. The combined effects of the achievements of the strong kings of the twelfth and thirteenth centuries, and of the Tudor dynasty in the sixteenth century, enabled her to assimilate enough of the continental ideas of law and government to become a territorial state of the modern type without losing touch with her mediæval past. Thus, partly because of her insular position, partly because of the accidents of her earlier history, partly because of the statesmanship of the Tudor sovereigns, she alone among European states has been able to secure for her law and her constitution a development which has been predominantly native and entirely continuous.

Continental influences upon English law and politics have been at some periods great, at others small. But from an early period the great waves of intellectual change which have from time to time swept over Western Europe have never failed to reach our shores and to influence our history. One of these great waves of intellectual change was the legal renaissance of the twelfth and thirteenth centuries, which, as we have seen, had large effects in helping forward the growth of a centralized government and a common law.[1] But for that legal renaissance, but for the fact that its influence was felt through the writings of Glanvil and Bracton, through the practical work of many other judges of the King's Court, and through the technical skill with which their successors in the fourteenth and fifteenth centuries built upon these foundations, English law could never have become a common law capable of expanding indefinitely with the new wants of a changing society. Another of these great waves of intellectual change was the Renaissance of learning and letters, the Reformation of religion, and the Reception of Roman law, which came in the sixteenth century. As in the twelfth and thirteenth centuries, so in the sixteenth century, the effects of these movements were modified both by the insular position of England and by the peculiarities of English institutions. And, as was perhaps inevitable, the modifications due to these two causes were more apparent in the later than in the earlier period. In the twelfth and thirteenth centuries the law and institutions of England had not attained a fixed and definite shape. At the beginning of the sixteenth century England was ruled by a king at the head of a constitution, the main outlines of which had been drawn in the thirteenth and fourteenth centuries, and by a common law, the development of which had been native. And though these facts had little direct bearing on the influence of the Renaissance, they had much upon the influence of the Reformation and the Recep-

[1] Vol. ii 145-146, 177-178, 205-206, 228-229, 269-270, 288-290.

tion. The English state had already set its face against papal encroachments upon its sphere; and, in the fourteenth century, the position which the state was soon to take in relation to the church had been fore-shadowed.[1] The law of the English state was a technical system, very jealous of foreign influences, and disposed to extend its boundaries at the expense of all rival jurisdictions. When order had been restored by the Tudors, the existing law and the existing framework of government were found to be partially sufficient for the needs of the modern state. There was no need to construct a new order of government and to receive a foreign system of law.

But changes and additions were needed if England was to compete with the centralized territorial states of the continent. In particular new institutions were needed to check not only disorderly feudal elements which still threatened to disturb the state, but also the disorders occasioned by religious, social, and economic changes; and new legal developments were demanded to meet the needs occasioned by these changes. It is through these new institutions and new legal developments that we can trace the influence of some of the new continental ideas upon law and politics. Here as abroad they made for the strengthening of the monarchy as a safeguard against disorder. But, whereas abroad these new institutions and new legal developments made up the principal part of the law and government of the new territorial state, here they were at most supplementary to and co-ordinate with the older institutions, and with the mediæval common law, which still remained, as in the Middle Ages, "the highest inheritance of the king by which he and all his subjects are ruled."[2]

In many different countries in Europe in the sixteenth century there was a conflict between modern and mediæval institutions and ideas; and in most of these countries the victory was with the former. But, in England, mediæval institutions and ideas continued to exist side by side with the modern; and, in the seventeenth century, they proved to be an insurmountable obstacle to the aims of the Stuart kings, who, like their contemporaries abroad, founded a theory of absolutism upon the achievements of their predecessors. The Stuart kings found it impossible to bring the administration of the law and government of England into line with the administration of the law and government of the absolute monarchies of the continent. On the contrary, the mediæval institutions and ideas proved to be stronger than the modern, and, by the end of the century, they had mastered and assimilated them.

[1] Vol. i 584-587; vol. ii 304-306.

[2] Ibid 436 n. 2.

The modern law and constitution of England which resulted was thus the product of a blend of mediæval and modern institutions and ideas which was unique. Hence by the end of this period English law and the English constitution had assumed a shape which was very different from the laws and constitutions of the other states of Western Europe.

PART I

SOURCES AND GENERAL DEVELOPMENT

CHAPTER I

THE SIXTEENTH CENTURY AT HOME AND ABROAD

JUST as in the twelfth and thirteenth centuries it was necessary to take into account the influence of the men who were making a canon law to rule the Western church, and were developing from Justinian's books rules fit to guide the political conditions of mediæval Europe; so, in relating the history of English law in the sixteenth century, we must take into account the new influences which all over Europe were making for the decay of mediæval legal and political ideas, and for the rise of the modern territorial state. Indeed, it may be said that in the later period even more than in the earlier period, it is essential to bear in mind these continental influences; for the changes which in the later period were taking place all over Western Europe were far more varied and far greater in their extent and effect. The twelfth and thirteenth centuries were centuries mainly of a legal renaissance: the sixteenth century was a century of renaissance and reform and change in many other things—in literature, in art, in religion, in commerce, in the physical boundaries of the world. I am not writing a history of these things; but they all had some share in shaping the new conceptions of law and politics which arose in this century; and it will therefore be necessary, as we shall see, to allude to some of their effects upon the development of English law. In this chapter therefore I shall deal with some of the more important of the external influences which, in the sixteenth century, operated, both at home and abroad, upon constitutional mechanism and legal ideas. In the four following chapters I shall deal in some greater detail with the changes in and additions to the fabric of English law

which, during the sixteenth and earlier half of the seventeenth centuries, resulted from these influences.

The contrast between the sixth and seventh Henries' is not more striking than the contrast between the political condition of Europe at the beginning of the fifteenth century and its political condition at the beginning of the sixteenth century. In the earlier period France was so weakened by feudal turbulence that Henry VI., with the help of the Duke of Burgundy, was proclaimed king of France at Paris. In the later period the king was master in his realm. A considerable part of the dominions of the old duchy of Burgundy had been annexed to France, and, with the marriage of Charles VIII. to the heiress of Brittany, the last of the great independent provinces was annexed to the crown. We can see the beginnings of the process which will concentrate in the king all the powers of the state. In the earlier period Germany was little more than a geographical expression. The Swiss, the Scandinavian powers, the Poles, the Magyars, and the Slavs were encroaching upon the borders of the Empire; and within its bounds private war was waged unchecked. In the later period there were at least some attempts to reconstitute national unity. The establishment of the Common Penny, the establishment of the Imperial Chamber, and the proclamation of the public peace sanctioned by the ban of the Empire in 1495; the establishment of a Council of Regency in 1500; the organization of the Empire into six circles for administrative and military purposes in 1512 —all bore witness to the tendencies of the age in the direction of unity. But they effected little. The knights, the cities, and, above all, the independent position of the electors and the princes proved insurmountable obstacles to the welding of Germany into a united nation. Both the emperor and the princes were intent on pursuing the dynastic policies of their respective houses. The house of Hapsburg, by a series of lucky marriages, secured in the person of its representative Charles V. not only the Empire, but also the dominions of Spain and the Netherlands; and it could thus stand forward as the great rival of the newly consolidated kingdom of France. But Germany itself "was not a kingdom, but a collection of petty states, whose rulers were dominated by mutual jealousies. From the time of Charles V. to that of Frederick the Great, Germany ceased to be an international force; it was rather the arena in which the other nations of Europe, the Spaniard, the Frenchman, the Swede, the Pole, and the Turk fought out their diplomatic and military struggles."[1] In the earlier period Spain was

[1] A. F. Pollard, Camb. Mod. Hist. ii 279.

torn by internal discord. In the later period the union of Castile and Aragon under Isabella and Ferdinand, and the effective measures which they took to curb the powers of the nobility, laid the foundations of a united nation—a fact which was marked by the final expulsion of the Moors from Spain in 1491.

In ecclesiastical history the earlier period is the age of the Councils—an age in which the nations of Europe debated not only the position of the Pope and the whole theory of ecclesiastical government, but also fundamental doctrines of the church which had been called in question by the heresies of Wycliffe and Huss. But the growth of distinct nationalities enabled the Pope to preserve his supremacy for a season by a series of separate concordats; and the policy of establishing a temporal power, begun by Sixtus IV. (1471-1482) gave him a fleeting independence. But this policy of Sixtus IV. was in the long run fatal to the position of the Papacy both as the umpire among the nations of Europe, and as the religious head of Western Christendom. It became merely one among the many Italian states which were contending for power; and this left it in the position of a shuttlecock between the greater European powers, who, at the beginning of the sixteenth century, made the lordship of Italy the object of their ambition. At the same time the Popes had accepted the position of Italian princes, and had imitated and even improved upon the example set by their contemporaries and rivals. The nepotism and immorality of some of the Popes, and their total immersion in secular politics, were scandals which were only gradually mitigated when the spread of the Reformation had awakened the church to the need of a counter-reformation in its own discipline and doctrine and practice.

In one respect there is a similarity between the two centuries. In both the Turk was a menace to Europe; and a greater menace in the later than in the earlier period. As early as 1356 he had gained a foothold in Europe. In 1453 Constantinople had fallen; and Serbia, the Balkan States, and Greece were over-run. Even Italy was threatened. For a time the Turkish advance was checked by Hungary. But when the Hungarian power was broken at Mohacz (1526) the divisions of the German Empire seemed to open the way to further conquests. Vienna was besieged; but its relief (1529) saved Germany. The partition of Hungary which followed marked the final limit of the Turkish advance into Europe, just as later in the century the Spanish victory of Lepanto (1571) marked the limit of the Turkish control of the Mediterranean

By the end of the century the process is begun by which the Turkish peril will gradully subside into the Eastern Question.

England at the end of the fifteenth and the beginning of the sixteenth centuries experienced changes similar to those which were taking place on the continent. The monarchy, reconstituted by Henry VII. and further strengthened by Henry VIII., proved to be too strong for a nobility weakened by the Wars of the Roses. Under the cautious rule of the father, and the strong rule of the son, the judicial system was improved,[1] the executive was immensely strengthened, and England took a new and a definite place among the newly constituted nations of Europe. Moreover, under Henry VIII. the attitude of England to the Reformation was definitely settled. The church was reformed, and made an integral part of the state, with the result that the power of the central government was strengthened,[2] and the foundations were laid for extensive and beneficial changes in local government.[3] In his reign, indeed, England almost appears to be an absolute monarchy of the continental type. But when we turn our eyes from the activities of the Tudor kings and statesmen at home and abroad, and look at the mechanism of government,[4] at the writings of political theorists,[5] and at the system of law public and private,[6] we can see that in many ways the law and government of England departed from this type. In spite of all differences, however, this period of prerogative rule has left enduring marks upon our constitution and our law. The marks might have been more enduring if the direct line of the House of Tudor had not failed.[7]

In describing this great transformation from which the Europe and the England of to-day emerges, I shall deal in the first place with the new ideas which in this century revolutionized all fields of thought and all departments of knowledge. This transformation may be summed up in the two words Renaissance and Reformation; and its legal and political outcome was the modern territorial state. In the second place I shall deal with the new institutions which the organization of this modern territorial state necessitated. In the third place I shall deal with the new rules of law which were called into being to govern these altered political conditions. This will involve both an account of that Reception of Roman law, which has affected more or less deeply the legal systems of the principal states of Western Europe, and an attempt to estimate its influence upon the development of English law.

[1] Vol. i 122-128, 409-411, 412-414, 492-508.
[2] Ibid 588-598; below 56 seqq.
[3] Below 137-165.
[4] Below 165-166, 173-190.
[5] Below 209-215.
[6] Below 285-288; vol. v 176-177, 194-196.
[7] Below 53, 190.

I

THE NEW IDEAS—RENAISSANCE AND REFORMATION

"There exists," says Dicey,[1] "at any given time a body of beliefs, convictions, sentiments, accepted principles or firmly rooted prejudices, which, taken together make up the public opinion of a particular era, or what we may call the reigning or predominant current of opinion. . . . It may be added that the whole body of beliefs existing in any given age may generally be traced to certain fundamental assumptions, which at the time, whether they be actually true or false, are believed by the mass of the world to be true with such confidence that they hardly appear to bear the character of assumptions." It is the character of these "assumptions" which created the public opinion of the Middle Ages, and gave to mediæval history its leading and distinguishing characteristics. It is the Renaissance and Reformation of the sixteenth century which substituted other "assumptions," created a new public opinion, and thus started the modern history of Europe. Therefore, if we would understand the law of the sixteenth century, and its relation to the law of the Middle Ages, we must understand the nature of the changes signified by these two words.

I have already described the leading characteristics of the assumptions which created the public opinion of the Middle Ages, and coloured all its ideas upon law and politics.[2] In the sixteenth century many causes contributed to subvert the intellectual conditions which had resulted from them.

The Renaissance of classical studies had begun in Italy in the last half of the fourteenth century. In the last years of that century, and in the fifteenth century, the study of the Greek classics was pursued side by side with the study of the Latin classics; and this revival of classical studies soon produced a complete break with mediæval modes of thought. The older monuments of learning and art were no longer looked at through the spectacles of the scholastic philosophy and theology. They were studied in and for themselves. Human reason, unfettered by preconceived theories, theological or otherwise, tried to discover the meaning which they had to the men who made them; and this necessarily gave a wholly new meaning to the older studies —to grammar, to history, to literature—and led to the growth of new standards of taste, both in literature and art. It was the real world of classical antiquity which was thus revealed—a wholly new world of thought to that age; and of that world man and

[1] Law and Opinion 19, 20.

[2] Vol. ii 127-144.

man's intellect and aspirations and desires were the centre. These things were no longer to be regarded as pomps and vanities of this wicked world except in so far as they were used to further that logical system, which took the doctrines of the church as their premises, and viewed all human knowledge in the light of deductions from them. This world might be wicked and it might be transitory, but it was meant to be lived in. Man's senses and faculties were given him to use, not to mortify; and he was under no obligation to view all knowledge from one particular standpoint. He was the master of his fate, and it was his duty to act and think and reason freely and fearlessly, not only upon art and literature, but upon history sacred and profane, upon religious doctrine,[1] and eventually upon physical science.[2] These views were disseminated throughout Europe by lectures, by schools, by academies, and by the printing press. Students flocked to Italy to study the new learning, as in former days they had flocked thither to study Roman law. The results may be seen and illustrated by the writings of men of such opposite characters as Machiavelli and Sir Thomas More. In *The Prince* the whole scheme and theory on which mediæval thought rested is simply disregarded. He "consistently applied the inductive or experimental method to political science." "An appeal was to be made to history and reason; the publicist was to investigate not to invent —to record, not to anticipate—the laws which appear to govern man's actions."[3] Similarly in the *Utopia* of Sir Thomas More the actual facts of society are looked at with a critical eye, and its faults are satirized by the comparison with his ideal republic, which rests on bases very different to any which could have been deduced from the old premises of the scholastic philosophy.

As we can see from the *Utopia*, the discovery of the New World intensified the tendency to abandon the ancient ways. Ralph Hythlodaye, who relates his adventures in Utopia "for the desire that he had to see and knowe the farre Countreyes of the worlde," had "joyned himselfe in company with Amerika Vespuce;" and it was on one of these voyages that he had found this ideal commonwealth. In fact, it was not merely the premises of the old philosophy which were being undermined. The physical world was being enlarged and changing its shape. New countries, new nations, new phenomena of all kinds were emerging. With these things the old learning, the old modes of thought and reasoning were powerless to deal. They must be investigated;

[1] Cf. Acton, Lectures on Modern History 77-79.

[2] Below 13 and n. 1.

[3] L. A. Burd, Camb. Mod. Hist. i 212-213. It was naturally anathema to writers who favoured the older order; thus Pole said of it that "it had already poisoned England and would poison all Christendom," L. and P. xv no. 721.

and the results of that investigation necessarily led to the abandonment of old theories, not only as to the physical constitution and position of the universe, but also as to men's relations to it and to one another.[1]

We have seen that theological ideas and dogmas dominated the old learning in all its branches. Any fundamental change therefore in any branch of knowledge necessarily involved some reconsideration of men's religious beliefs. Could these beliefs be reconsidered and restated in such a way as to bring them into harmony with the new order? Some, notably Erasmus, thought that this was possible. And if there had been merely the intellectual difficulty arising from the necessity of readjusting an old theology to new points of view, the sixteenth century might have managed to effect such a readjustment as skilfully as the nineteenth century. But, in the sixteenth century, the intellectual difficulty was far greater, nor was it by any means the only difficulty. In the first place, theology was not merely a special branch of knowledge: its conceptions dominated all knowledge. In the second place, church and state were in a sense one society; and therefore any questioning of the dogmas of the church, and of its position in relation to the state, meant far more than the alteration of one particular society within the state. It meant rather the unsettling of the foundations of all society. In the third place, the church had enormous vested interests in the maintenance of the old order. Finally, the abuses rampant in the church had been thrown up into stronger relief by the changed political and intellectual conditions of Europe; and they had inspired a hatred of the church and of churchmen which made it certain that no peaceable readjustment of the old ideas to the new could be effected. Any attempt at change was sufficient to upset a system which had long been growing more and more unstable, and to begin a religious revolution. The acts which were the immediate and proximate causes of the movement—Luther's ninety-five theses and his bonfire of the papal bull and the books of the canon law, the divorce question in England—were merely sparks which produced their far-reaching effects because they touched a mass of explosive matter.

[1] We may remember that this century is the century of Copernicus, Tycho Brahe, Kepler, and Galileo, below 50; the works of writers like Bodin show the manner in which the new facts due to the discoveries had enlarged the outlook of political philosophers, and had enabled them to give a new form and meaning to the older authorities, see e.g. Bodin, Le République Bk. v c. 1—the title of this chapter is "Du reiglement qu'il faut tenir pour accomoder la forme de République à la diversité des hommes: et le moyen de cognoistre le naturel des peuples;" but, as we shall see, the greatest exponent of the fundamental inconsistency of the old aims and methods and theories with the new facts is our own Francis Bacon, below 49-52.

Thus began the religious Reformation of the sixteenth century. It stopped all thoughts of peaceable change in the religious world. It stopped for a time the gradual spread and peaceable development of the new learning, and in the end it changed the course and modified the results of the new learning upon the intellectual world. It involved changes and readjustments not merely in men's religious and mental outlook, but also in the machinery of the state. These changes and readjustments are at the root of many legal, constitutional, and political developments, and, more than any other single cause, have made the Western Europe of to-day. The Reformation, therefore, though primarily a religious movement, has aspects which stray far from the history of religion, and appeal in their different ways to the legal, the constitutional, and the political historian. In order to understand its effects upon the legal and constitutional and political development of Europe and of England, I must touch very briefly upon some of the conditions which made it inevitable.

In the first place, the movement had a moral aspect. In all spheres of the church's activity there was much that was well calculated to excite the moral indignation of thinking men. There were abuses connected with the doctrines of the church—notably indulgences; abuses connected with the manner in which the offices of the church were bestowed and used—simony, nepotism, plurality, non-residence; abuses connected with the ecclesiastical courts. The immorality of many of the clergy, their exactions, and immunities, and, above all, the venality, immorality, and even actual infidelity rampant at the papal court had long been notorious. They had resulted in an intense popular hatred of and contempt for the clergy—feelings which the printing press could now express, concentrate, and popularize.[1]

In the second place, the movement had an intellectual aspect. The new modes of thought affected the position of the church in different ways in different countries. In Italy and at Rome itself it led in many cases to sheer paganism. To many, even of those who lived upon the revenues of the church, this world and its pleasures—intellectual, artistic, and sensual—were all in all;[2]

[1] For a detailed account see Lea, Camb. Mod. Hist. i 653-677; and cf. Ranke, History of the Reformation in Germany (Austin's tr.) i 272-278; for some account of indulgences and their abuses see Acton, Lectures on Modern History 91, 92; in 1523 Erasmus wrote to Adrian VI., "Non ausim scribere in quam multis regionibus quam penitus, popularibus animis sit infixus Lutheri favor et odium Pontificis nominis," Epistolae no. dcxlix (Opera omnia, ed. 1703) vol. iii. Pt. I.; L. and P. ii nos. 3277, 3352 (1515) an account of a plot of certain cardinals to poison the Pope—"omnis fides, omnis honestas, una cum religione a mundo abvolasse videntur," is Pace's comment, ibid no. 3523.

[2] "The Prince was published by the Pope's printer, with the Pope's permission; a cardinal shrank from reading St. Paul for fear of spoiling his style; and the scandals in the family of the Borgia did not prevent bishops from calling him a god. . . . An

and this temper of mind gave no small help to the Reformation in its earlier stages. Firstly, it produced an indifferent tolerance which allowed the movement to gather force. Secondly, its effects upon the papal court gave force and point to the moral denunciations of the reformers. Among the northern nations the new studies had a more serious, a more practical, and a more religious effect. Fairbairn has clearly pointed out one of the chief reasons for this difference.[1] "The Latin race, especially in Italy, was the heir of the Roman Empire, still a vivid memory and a living influence; its monuments survived, its paganism had not utterly perished; its gods were still named in popular speech; customs which it had sanctioned and dreams which it had begotten persisted, having refused as it were to undergo Christian baptism. . . . Here the Renaissance could not but be classical. . . . The Teutonic mind, on the contrary, had no classical world behind it. . . . Its conscious life, its social being, its struggles for empire and towards civilization, its chivalry, its crusades, its mental problems, and educational processes, all stood rooted in the Christian religion. Behind this the memory of man did not go." The resources of the new learning, therefore, were directed to the study and criticism of the Bible, to serious educational work, to the exposure of clerical follies and scandals. Incomparably the most eminent of those who devoted themselves to this task was Erasmus. He did more than any other single man to popularize the new modes of thought, to satirize the abuses in the church, and to apply the new learning to the reformation of religion.[2] His *Praise of Folly* (1511) encouraged men to continue to ridicule[3] the follies of the old learning and the clergy its supporters, as Ulrich von Hutten and other scholars had ridiculed them in the *Epistolae Obscurorum Virorum.* His edition of the New Testament and the commentary annexed to it[4] encouraged men to contrast the Christianity of the Bible with the Christianity of the church, as Luther contrasted them in his address *To the Christian Nobility of the German Nation.* The thoughts that the

open conflict was averted at the cost of admitting into the hierarchy something of the profane spirit of the new men, who were innovators but not reformers," Acton, Lectures on Modern History 79, 80.

[1] Camb. Mod. Hist. ii 692, 693.

[2] Acton points out, Lectures on Modern History 88, that printing in Italy had been going on for sixty years, and that 24,000 works had issued from the press before anyone thought of printing the Greek Testament; Erasmus himself said that, "Letters had remained pagan in Italy until he taught them to speak of Christ," ibid.

[3] For an account of and some extracts from this work see F. Seebohm, The Oxford Reformers 193-205; for earlier works see Ranke, History of the Reformation in Germany (Austin's tr.) i 278-281; Camb. Mod. Hist. i 675, 677; and for England see vol. ii 306, 413, 414.

[4] See F. Seebohm, The Oxford Reformers, Chap. XI. for an account of the work of Erasmus on the New Testament and St. Jerome.

Bible unencumbered by tradition should govern men's beliefs, that perchance the papal supremacy over the church was not ordained of God, that other modes of ecclesiastical organization more akin to primitive Christianity could be constructed from the Bible, that man was directly responsible to God and needed no priest to mediate—all began to germinate.

In the third place, the movement had a political aspect. In none of the countries of Western Europe had the relations between church and state been quite harmonious; and it is clear that the large claims of the church to the obedience of the clergy were incompatible with the claims of the new territorial state. Moreover, the rulers who were constructing these states were casting envious eyes upon the large revenues of the church. They were quite ready to take advantage of the abuses in the church to compel reforms which would increase their own influence and their own revenue as well as the usefulness of the clergy. But all these claims could be and were effected without a breach with Rome. Legal and political speculation had found a niche for the territorial state without making any great break with the mediæval theory of the universal state and a universal church. State and Empire and Church could all be recognized as *universitates*, all de facto possessing large powers within their own spheres.[1] The delimitation of these spheres was a matter for diplomacy to settle in the light of actual facts. The Popes in the age of the Councils had already shown that they were skilful diplomats.[2] Kings who were consolidating their dominions had no particular wish to promote religious changes which were causing a revolution in the church, and might well unite with other elements of disorder to cause a revolution in the state.[3] Here therefore was a fair basis for negotiation. Bargains were struck. The state gained a large control over the persons and wealth of the clergy: on the other hand, the church gained the assistance of the secular arm in the work of suppressing heresy, and retained some part of its wealth and influence.[4]

[1] Woolf, Bartolus of Sassoferrato 113, 114; below 191, 243.

[2] Figgis, From Gerson to Grotius 45.

[3] Francis I. said of the Reformation, "Cette nouveauté tend du tout au renversement de toute monarchie divine et humaine," cited H. Lureau, Les doctrines democratiques de la seconde moitié du XVIe siècle 10.

[4] Figgis, Divine Right of Kings 109, 111; see Esmein, Histoire du Droit Français (11th Ed.) 713-717 for the French concordat of 1516; Ranke, Turkish and Spanish Monarchies (Kelly's tr.) 60 for the control exercised by Phillip II. over the church—a control which had begun to be strict as early as the reigns of Ferdinand and Isabella, Camb. Mod. Hist. i 353, 355, 356; Ranke, Hist. Ref. in Germany ii 168-174 for the bargain made with the Pope by the Dukes of Bavaria—as he says, "What others are striving to wrest from the Pope by hostile measures, they continued to retain with his concurrence;" see F. Seebohm, The Oxford Reformers 422, 423 for the way in which the money raised by indulgences was shared between the Pope and the temporal ruler; cf. L. and P. ii *i* Introd. cciv-vi.

Such an arrangement, if coupled with a reform of the abuses of the church and with improved modes of education, seemed to many of the finest minds and best statesmen of the age—to Erasmus,[1] to More, to Wolsey, and perhaps to Pole,[2] the best solution of the problem; for it added to the efficiency of both church and state, it obviated all danger of revolution, and it furthered the peaceful progress of the new learning.[3] Mere diplomacy, it is true, could not deal effectually with the deep-seated moral indignation of the people, nor could it at once procure the adjustments needed to meet the demands of new intellectual points of view. Still less could it deal with the tendency to discard Catholic tradition and to submit everything—dogma, ritual, church government—to the words of the Bible as interpreted by the private judgment of the reader—a tendency which was manifestly strengthened by the publication of Luther's translation of the Bible which was reprinted eighty-five times in eleven years.[4] But these diplomatic concordats gave the Papacy time to realize the gravity of the situation; and, if such concordats could have been made with all the states of Europe, the Reformation might have been stifled. Neither moral indignation, nor intellectual dissatisfaction with the existing order, nor changed beliefs would have sufficed without some measure of protection from the state at the beginning of the movement.[5]

Fortunately for Europe this measure of protection was found in Germany. Germany had suffered more than any other country in Europe from ecclesiastical abuses. There the moral indignation was keenest, and the tendency to doctrinal change the most widespread. There, too, the absence of any strong central government prevented any diplomatic arrangements between church and state.[6] Some of the princes no doubt were willing

[1] In his *Spongia versus aspergines Hutteni* (Ed. 1523) he defines his position, "Mihi consultius visum est hic conquiescere donec principes et eruditi, studiis omissis, expetant ea consilia quae sine tumultu prospiciant evangelicae veritati et gloriae Christi;" and again, "Hoc interim consilium dederim utrique parti ut neutri addictus itaque utrique bene cupiens;" as he points out, "Neque corona neque mitra addit sapientiam Evangelicam fateor, sed neque vulgarem pileum aut cingulum addit. Qui se putant donum spiritualem ne spernant publicam auctoritatem."

[2] Starkey's England (E.E.T.S.) cxviii-cxxv.

[3] See Acton, Lectures on Modern History 99, 100 for an attempt to bring Luther over to this view.

[4] Acton, op. cit. 103.

[5] "Where Protestantism was an idea only, as in Spain and Italy, it was crushed out by the Inquisition; where, in conjunction with the political power and sustained by ecclesiastical confiscation, it became a physical force, there it was lasting," Stubbs, Lectures on Mediæval and Modern History 268.

[6] Erasmus pointed out to Adrian VI. that though the Wyclifite heresy had been suppressed—"sed oppressa verius quam extincta"—by royal power, this could not

9566

to arrange a concordat with Rome; but others were willing to protect the reformers both because they felt the national indignation against Papal abuses, and also because a Reformation would help them to consolidate their power as against the emperor.[1] In fact the Reformation gave a fatal blow to the cause of German unity, the effects of which were intensified when the Protestant sects began to quarrel among themselves. The finishing touch was given to the power of the princely houses when the principle "Cujus regio ejus religio" was adopted in 1555, at the diet of Augsburg. The Protestant prince was the lord both of church and state. "He is the guardian both of the first and the second table of the law."[2] He must uproot false doctrines, and actively propagate the true,[3] for the civil law contains many penal laws against idolatry.[4] He must have regard not only to the lives and property of his subjects in this world, but also to their eternal welfare.[5] Property of the church which is being misused he must apply to righteous uses.[6] It is easy to see that a Catholic prince could hardly be expected to content himself with an inferior position. The idea, not only that the state is supreme over all its subjects,[7] but that it has attained to much of that divinity which in the Middle Ages was

be done in Germany; he says, "Et tamen quod tum in eo regno licuit, quod totum ab unius nutu pendet, nescio an hic licet in tam vasta regione inque tot Principes dissecta," Opera (Ed. 1558) iii 580.

[1] Thus, as Ranke points out, Hist. Ref. in Germany ii 89, the electorate of Saxony was the refuge for all those oppressed by the spiritual authorities; cf. Camb. Mod. Hist. i 690, 691, "A single prince, like the Elector Frederic of Saxony, could protect it in its infancy. As the revolt made progress other princes could join it, whether moved by religious considerations, or by way of maintaining the allegiance of their subjects, or in order to seize the temporalities and pious foundations, or, like Albrecht of Brandenburg, to found a principality and a dynasty."

[2] Melanchthon, *De officio Principum quod mandatum Dei praecipiat eis tollere abusus Ecclesiasticos* (Ed. 1539); for similar views as to the power of the Prince held by Luther and Calvin see H. Lureau, Les doctrines democratiques de la seconde moitie du XVI[e] siècle 22-25; Figgis, From Gerson to Grotius 64-74.

[3] Melanchthon, op. cit., "Principes et magistratus debere impios cultus tollere et efficere ut in Ecclesiis doctrina tradatur et pii cultus proponatur."

[4] Ibid. "Has rationes haud dubie secuti sunt Constantinus, Valentinianus, et Theodosius qui cultum Idolorum legibus prohibuerunt."

[5] Ibid. "Non tantum ad querenda et fruenda ventris bona sed multo magis ut . . . aeterna bona querantur."

[6] Ibid. "Cum autem pauci divites haec studia ecclesiastica colant, necesse est honesta stipendia constitui Pastoribus Ecclesiarum, doctoribus, et discentibus in scholis. Hanc ad rem transferendae sunt opes Collegiorum et Monasteriorum quae injuste tenentur et devorantur ab indoctis, ociosis, denique ab hostibus Evangelii."

[7] "The constitution of the Lutheran churches contributed even more than the revival of the Civil Law to establish the absolute sovereignty of States," Acton, Lectures on Modern History 104; "Richelieu no less than Cecil or Parker, was a product of the Reforming movement. Had there been no Luther there could never have been a Louis XIV.," Figgis, From Gerson to Grotius 71; "the old order had reached from heaven to earth. The new was frankly limited to a single point, the Prince was supreme; that, for Luther as for Austria, was all sufficient," T. Baty, International Law, 224.

the peculiar attribute of the church, is rapidly emerging.[1] What form the state shall take is another question.[2]

In so far as the Reformation subordinated the church to the state it gave material help to the forces which were making for the construction of the self-contained territorial state. In France the state obtained by treaty with the Pope large rights over the church.[3] In Spain not only was the state supreme,[4] it was even able to make use of the organization of the church to establish a system of absolute government. The Inquisition was the serviceable tool of the government. "It was the inquisition," says Ranke,[5] "and the Inquisition alone that completely shut out all extraneous interference with the state: the sovereign had now at his disposal a tribunal from which no grandee, no archbishop, could withdraw himself. . . . Open heresy was not the only question it had to try. Already Ferdinand had felt the advantages it afforded, and had enlarged the sphere of its activity. Under Philip II. it interfered in matters of trade and of the arts of custom and marine. How much further could it go when it pronounced it heresy to dispose of horses or munition to France?" In Germany, as we have seen, it consolidated the power of the princely houses. But though in its ultimate results it would be true to say that the Reformation has powerfully assisted in the creation of the autonomous state, its immediate results were sometimes quite the reverse. In essence it was a revolt against authority; and a revolt based upon religious motives. It could not be expected that all the members of the state would acquiesce in the religion dictated by their rulers, whether it was of the reformed or of the unreformed type; and these dissenters would naturally find sympathizers among their co-religionists abroad. This aspect of the Reformation came to the front with the spread of Calvinism and the beginning of the counter-reformation in the latter half of the century. The Calvinistic movement was both popular and aggressive. The organization and the discipline, which were characteristic of it, fitted it to be the fighting force of Protestantism, when the Roman Catholic Church began to organize its forces for the life and death struggle between the old and the new churches. But this struggle necessarily attracted many other elements of discontent in many different nations. There was an element of feudal disorder in the religious wars in France; and these wars gave opportunities to other competitors with the crown for political power—to

[1] Figgis, Diyine Rights of Kings 92-93; cf. Sorel, L'Europe et la Revolution Francaise i 12. [2] Below 192-199. [3] Above 16 n. 4.
[4] Ibid. [5] Turkish and Spanish Monarchies (Kelly's tr.) 62.

the Estates General, and the Parlement of Paris.[1] It was the Calvinists of Holland who at length succeeded in throwing off the yoke of Spain; and their success showed that religious dissent allied to a constitutional opposition could accomplish a feat which could never have been accomplished without this alliance. In Scotland the Calvinistic movement united itself to the popular indignation at ecclesiastical abuses, and to the desire of the nobility for the wealth of the Church. It was helped by the feudal independence of the nobility; and it succeeded in organizing a Church, so true to the principles of Calvin, that its strength made it as serious a rival to the independence of the state as the church of Rome.[2] We shall see that in England the same movement united itself with Parliamentary opposition to the government, while the discontent of the Roman Catholics gave rise to disorder of the feudal type.[3]

Thus it might well have seemed, in the latter half of the sixteenth century, that the Reformation was hindering the growth of the modern state, just as it seemed to have hindered the progress of the literary Renaissance. But by the end of the century it was becoming fairly clear that in both cases its effects had been, not to hinder, but to complete and to modify.

It completed the structure of the modern state, for it finally disposed of the mediæval political and religious theory of a universal state and a universal church. The horrors of the religious wars strengthened the desire and the need for efficient government which such a state alone could satisfy. National feeling began to rise superior to religious animosity—as the rise of the Politiques in France,[4] and the assistance given to the Government by the English Catholics at the time of the Armada show. By thus making the mediæval political and religious theories impossible it assured the victory to the new learning and to the new modes of thought. The several independent states of modern Europe formed an appropriate environment in which new opinions could be formed, new ideas arise, and new discoveries increase, because their independence and diversity taught men that it was possible to

[1] Armstrong, French Wars of Religion 31, 32; below 168, 170-172.

[2] "In the writings of Cartwright and Goodman we have clear proof that the political claims of Presbyterianism were as oppressive, as tyrannical, and as preposterous as those of Rome. The two systems, Papal and Presbyterian, are alike in that they both regard the State as the mere handmaid of an ecclesiastical corporation, and would, in the last resort, place the supreme direction of politics in the hands of the rulers of the Church," Figgis, Divine Right of Kings 191, 192.

[3] Below 38-39, 47, 48.

[4] They were the party who, as Tavannes said, "preferred the repose of the kingdom to the salvation of their souls; who would rather that the kingdom remained at peace without God, than at war for Him," cited Armstrong, French Wars of Religion 37; Figgis, From Gerson to Grotius 115, 116; cf. Sorel, op. cit. 55-56.

tolerate diverse opinions. The toleration extended by these states to one another inevitably led sooner or later to a toleration of divergent opinions within the state itself.

It modified the effects of the Renaissance and the theory of the state. The dilettantism and the paganism which had marked some aspects of the Renaissance in Italy disappeared; and we get the rise of national literatures, and solid advances in the exact and physical sciences. Theories of the state were no longer founded exclusively, as Machiavelli had founded his theories, upon a compound of classical instances and present experience. Mediæval theories upon religious, upon legal, and upon political topics were the weapons used by both sides in this period of conflict.[1] The period of the Great Councils in the fifteenth century had been fertile in these theories; and they were largely used by all the publicists of the sixteenth century.[2] The classical revival thus united itself to the political theories of the Middle Ages and to the underlying ideas of right, legal or moral, which were assumed by them. New theories of the state, based partly on the more exact knowledge of classical history which the Renaissance had rendered possible, partly on mediæval speculation and experience, preserved many mediæval ideas which a merely classical Renaissance would have destroyed, and so made further developments possible, both within the state, and in the relations of these states to one another.

Within the state these mediæval ideas did good service to those who opposed the state's absolute authority either from a religious or from a political standpoint. During this period the religious standpoint was the more efficient—it was in those countries in which religious dissent was most completely crushed that political freedom most completely disappeared.[3] The mediæval books necessarily played a large part in these controversies. In them many reasons both theological and legal could

[1] Figgis, From Gerson to Grotius 24, "So far as it (the Reformation) tended to revive the theocratic ideals, theological politics, and appeals to Scripture, in regard to the form of government, it was a reversion to the ideals of the earlier Middle Ages, which were largely disappearing under the combined influences of Aristotle and the Renaissance."

[2] Ibid 40, 41, 51, "Gerson, D'Ailly, and Nicolas placed the constitutional monarchy in such high light that it could not be altogether obscured even in later and more subservient ages;" cf. Figgis, Politics at the Council of Constance (R.H.S. N.S.) xiii 114, "This church council first exhibited the conflicts of pure politics on the grand scale," and, "In it the notions of pure constitutionalism gained the hall-mark of European acceptance."

[3] Figgis, Camb. Mod. Hist. iii 769, "The forces in favour of monarchy were so strong that, apart from a motive appealing to conscience, making it a duty (even though a mistaken one in any individual case) to resist the government, there would have been no sufficient force to withstand the tyranny of centralization which succeeded the anarchy of feudalism;" this saved the principles of liberty, "from a collapse more universal than that which befell Republican ideals at the beginning of the Roman Empire."

be found to justify resistance to a tyrant.[1] Arguments derived from them took up the work of those mediæval representative assemblies and mediæval courts which had gone down before the centralized force of the modern state.[2]

In the relations of these states to one another these same ideas did equally good service. Just as the mediæval political theories influenced the internal structure of the state and tended to prevent the growth of an unchecked and an unmitigated despotism; so the mediæval idea that states, as between themselves, had rights which should be respected[3] influenced the nature of their dealings with one another; and, by preventing the growth of the idea that their relations should be founded merely on the strength of the contending parties, tended to foster the idea that some element of law and right should enter into them. Without this idea, which we owe primarily to the fixed premises and the scholastic logic of mediæval speculators, international relations might have been for a long time wholly, or almost wholly, lawless.

These ideas were the parting gifts of mediæval legal and political theory to the modern world. It was a world in which the mediæval unity and universality of legal and political theory had given place to a diversity which rendered necessary a new political science, having as its basis the modern territorial state. The variations in the structure of these states tended to accentuate those national characteristics, and to create those systems of national law which have consolidated and stereotyped the differences between the separate states of modern Europe. At the same time the underlying similarities existing between them, due to common religious beliefs, to common legal and political ideas, and to a common historical development, created a real affinity which found its legal expression in the beginnings of our modern international law.[4] All these characteristic features of modern as distinct from mediæval history are the results of the allied movements of Renaissance and Reformation. Of the manner in which legal expression was given to these changes I shall speak when I describe the new institutions which arose in

[1] Below 197-199; the authorities relied on and the instances adduced by political theorists such as Bodin and Hotman are the best instances of this: as Figgis says (R.H.S. N.S.) xix 148, 149, "A perusal of the ordinary treatises (more especially the continental, but our own Hooker affords an example) on the topics that line the borderland between politics, law, and theology will make it clear that there is a certain common element in which all discussion takes place. This atmosphere is compact of a peculiar amalgam of law strictly so called, certain general ideas which are expressed in the civil and canon law, and some common principles of ethical and theological reasoning. All this is responsible partly for the internal structure of the modern state everywhere but in England, and to some extent here."

[2] Below 166-173; cf. Brissaud, Histoire du Droit Français 403, 404.

[3] Vol. ii 131-132.

[4] Below 289-290; vol. v 25 seqq.

this century, and the influence of the Reception of Roman Law. In the meantime I must give some account of the way in which the Renaissance and the Reformation affected the development of the English state.

The course which the Renaissance and the Reformation took in England was in some respects peculiar. But, whether we look at their causes, or whether we look at their effects upon the structure of the state and upon the development of public and private law, we shall see that, even when they are not directly affected by the course of events on the continent, they can often be better understood in the light of the analogies and contrasts which these events present to us.

No more difficult task ever confronted an English king than that which confronted the first Tudor. Abroad the foreign relations of England needed adjustment in the light of the new grouping of the European powers. At home it was necessary to maintain an insecure throne against foreign intrigue and domestic faction; to restore order in a nation accustomed for more than half a century to lawless ways, and for more than thirty years to civil war; to regulate the new conditions of domestic and foreign trade; and to provide for the solution of the new social problems, which had arisen from the break up of the mediæval economic and social organization. In the background there were the problems intellectual and religious set by the New Learning; and their discussion was certain sooner or later to raise the question of the condition of the church and of its relations to the state. We have seen that some of these difficulties and problems had begun to emerge at the end of the fourteenth century.[1] But they had been shelved during the reigns of Lancastrian and Yorkist kings, and had in the meantime grown in complexity. An attempt to solve them could no longer be delayed if the nation was to be saved from the anarchy to which a premature experiment in parliamentary government had reduced it.

The disorders from which all classes of society were suffering were many and various. "The hed agreth not to the fete, nor fete to the handys, no one parte agreth to other; the temporalty grugyth agayn the spiritualty, the commyns agayn the nobellys, and subjectys agayn ther rularys."[2] The times were out of joint, partly owing to want of governance, partly owing to the fact that the period was one of transition from mediæval to modern. In books like More's *Utopia* and Starkey's *England*

[1] Vol. ii 411, 413-414.

[2] Starkey, England in the Reign of Henry VIII. (E.E.T.S.) 82. This work is in the form of a dialogue between Pole, the future cardinal, and Lupset, lecturer on Rhetoric at Oxford; it is dedicated to Henry VIII.; for Starkey see Maitland, English Law and the Renaissance 41-46.

we see echoes of the old disorders from which society had been suffering all through the fifteenth century. Abuses in the procedure of the courts which lengthened lawsuits and fostered litigation;[1] abuses arising from the partial ministering of justice;[2] the hardness of the criminal law;[3] the benefit of clergy and the privilege of sanctuary;[4] the crowds of idle retainers and ignorant monks who led lives useless and even harmful to the state[5]—all these things were crying evils of long standing. But many of the other disorders which these writers denounce were the inevitable consequences of the passing of the mediæval order of society. In the first place, the old economic ideas were disappearing, and as yet no new theory had arisen to take their place.[6] The complaints which we hear as to the depopulation of the country owing to the conversion of arable into pasture;[7] as to the extravagance of the richer classes and their oppression of their tenants;[8] as to the combination of traders to raise prices[9]—all testify to the fact that competition was ousting custom as the basis of the economic system. In the second place, the ideas and methods of the scholastic philosophy were beginning to look foolish in the light of the New Learning which such men as Colet, Erasmus, More, Grocyn, and Linacre were bringing from Italy.[10] In England, as among other northern nations,[11] the New Learning was being turned to religious uses;[12] and it threw into stronger relief the worldliness and the cynical immorality which were rampant in the church. Many, notably Wycliffe, had attacked

[1] Starkey, op. cit. 83, "Prokturys and brokarys of both lawys wych rather trowbul mennys causys than fynysch them justely are to many; and yet gud mynystrys of justyce are to few;" cf. ibid 118, 191; vol. iii 623-627, and App. VII.

[2] Starkey, op. cit. 86, "Materys be endyd as they be frendyd;" Plumpton Correspondence (C.S.) 131-132, 134-135, 150-151—as to the "labouring" of sheriffs and jurors; Y.B. 1 Hy. VII. Mich. pl. 3; vol. ii 415-416.

[3] More, Utopia (Temple Classics Ed.) 14 (punishment of death for larceny); 27 (forfeiture of stolen property to the king).

[4] Ibid 31; Starkey, op. cit. 138-140; vol. iii 293-307.

[5] Utopia 15, 70, 71; Starkey, op. cit. 131 speaks of "Abbeylubbarys;" see below 505, 520 for the laws passed in Henry VII.'s reign against riots and retainers.

[6] As to this see Cunningham, History of Industry and Commerce, i 555—as he points out, books like More's Utopia and Starkey's England are "of more value as describing the course of events, than because of the explanations the writers were able to offer;" below 318-319.

[7] Vol. iii 209-211.

[8] Utopia 15; Starkey, op. cit. 175; vol. iii 502-505.

[9] Utopia 20—The sheep, says More, though they increase in numbers do not decrease in price, "For they be almooste all comen into a fewe riche mennes handes, whome no neade forceth to sell before they lust, and they luste not before they maye sell as deare as they luste."

[10] For an account of these men and their services to learning see F. Seebohm, The Oxford Reformers.

[11] Above 15.

[12] See Seebohm, op. cit. Chap. II. for an account of Colet's lectures; he probably began to lecture on the Epistle to the Romans in 1496-1497.

these abuses before.[1] But they were now felt the more keenly, because men were beginning to contrast in a more critical spirit the Christianity of the Bible with the theology of the schoolmen; and the attack was more deadly because it was directed not only against the abuses themselves, but also against the whole intellectual system under the shadow of which these abuses had sprung up.[2] Wycliffe had used the methods of scholastic disputation. The scholastic system itself was now attacked by the new weapons and from the new points of view of the Renaissance scholars.

Those who lamented the disorders from which society was suffering were not ready to suggest any very complete remedies. But there was one remedy upon which all were agreed—the state must be strengthened to suppress lawlessness. In England, as elsewhere, it was felt, and felt rightly, that it was only a strong king at the head of a strong executive who could curb the lawless practices of over-mighty subjects, who could see that justice was duly and indifferently ministered, who could maintain order amid apparently incomprehensible changes in old ideas and institutions.[3] It was therefore the first object of all statesmen in Western Europe at the end of the fifteenth century; and none accomplished that work more successfully than the kings of the House of Tudor.

Henry VII. was fitted by his early training and by his intellectual gifts to begin this task. He had been disciplined by adversity. His temperament was cold and cautious. He could seize quickly the vital points of a problem whether of foreign or of domestic policy; and he pursued the methods which he had devised for its solution with a businesslike determination.[4] "What he minded he compassed."[5] Above all, he seems to have possessed the two qualities which distinguished in a pre-eminent degree both Henry VIII. and Elizabeth—though "he was governed by none,"[6] he could choose and trust able ministers;[7] and he understood the temperament of his people.

As to the existence of the first of these qualities we have, it

[1] Vol. ii 413.

[2] See extracts from Erasmus, Praise of Folly, cited Seebohm, op. cit. 195-198 cf. Utopia 93.

[3] Above 20; Utopia 10, "From the prince, as from a perpetual wel sprynge, commethe amonge the people the floode of al that is good or evell;" Starkey, op. cit. 164, a good prince is "the fundatyon of al gud pollycy."

[4] Gairdner, Letters etc. of Richard III. and Henry VII. (R.S.) ii *xxviii*, *xxix*; see Bishop Fisher's appreciation in the sermon he preached at Henry's funeral, cited Tanner, Constitutional Documents 3.

[5] Bacon, History of Henry VII. Works vi 244.

[6] Ibid 240.

[7] Ibid 242, "He was served by the ablest men that there were to be found;' "And, as he chose well, so he held them up well."

is true, little detailed information. We know but little of the doings of his ministers, and of their relations to himself. But when the records of the Council begin in his son's reign, we see the king surrounded by just such a council of professional advisers as Fortescue had advocated;[1] and the actual evidence which we have points to the fact that this change was accomplished by Henry VII. Ministers such as Morton, Fox, and Bray, and officials such as Empson and Dudley, were men of a different stamp to that of the advisers of Henry VI. and Edward IV.[2] And he began the creation not only of an efficient executive, but also of an efficient secret service, which was extensively used and improved by his successors.[3] As to the existence of the second of these qualities the evidence is clearer. The whole course of his reign shows that he understood two well-marked and permanent characteristics of his people. The first was their devotion to their own institutions and the common law—a characteristic which was remarked by the Venetian ambassador.[4] The second was their dislike to taxation, which was shown by the only rebellions of the reign which were not dynastic.[5]

Henry never attempted to break the law, except perhaps in the matter of benevolences; and then the breach was condoned by Parliament.[6] But he used the law and abused it to supply his necessities. It is the abuse of the law, through the agency of Empson and Dudley, which is the greatest blot upon his reign; and the explanation of this phenomenon is not far to seek. In this reign, as in the reign of Edward I., an efficient executive was re-establishing orderly government after a period of disorder; and in both periods the new officials seem to have found it difficult to distinguish between the use and abuse of their new authority. The accusations made against Empson and Dudley are not unlike the accusations made against Stratton and his fellow-ministers.[7] Many of their practices, which seem to have become more and more oppressive as the reign proceeded, are quite indefensible;[8] and they seem to have aroused some feelings of compunction even

[1] Vol. i 484.

[2] Perkin Warbeck in his proclamation accused Henry of "putting apart all well disposed nobles," and employing "caitiffs and villains of simple birth," Bacon, Works vi 253.

[3] Ibid 217; Tanner, Constitutional Documents 4.

[4] Italian Relation of England (1496-1497) (C.S.) 37, "And if the king should propose to change any old established rule, it would seem to every Englishman as if his life were taken from him;" but he opines that a good many will be altered if the king lives ten years longer.

[5] A rising in 1489 in Yorkshire, and in Cornwall in 1497, Stubbs, Lectures on Mediæval and Modern History 400, 402.

[6] Ibid 412, 413; 11 Henry VII. c. 10.

[7] Vol. ii 295-298.

[8] Bacon, History of Henry VII. Works vi 217-220, 236; cf. Utopia 40-42.

in Henry himself.[1] There is no doubt that Henry VIII. did a politic act when he destroyed them; and as little doubt that their condemnation on a charge of high treason was unjust.[2] Like many of their successors, they bore the blame and paid the penalty not only for their own misdeeds but also for a service which was too faithful. For it is clear that Henry VII. was obliged to put the government upon a sound financial footing; and it is difficult to see how he could have accomplished this object if he had not sternly insisted upon enforcing the rights of the crown.[3] As Fortescue had pointed out, the poverty of the king had been one of the chief causes of the weakness of the Lancastrian dynasty.[4] Henry made the wealth of the crown the foundation of his power;[5] and he gathered his wealth by a rigid enforcement, and sometimes even by a perversion of the law. But as Dr. Gairdner says,[6] "The very fact that it was so perverted is a proof of Henry's greatness. That a king whose title was one of the most ambiguous ever seen in England, who was frequently troubled with rebellion, . . . should have succeeded in making the authority of the law so strong as not only to enable him to put down his enemies, but to become in his hands an engine of extortion, is evidence of Henry's ability as a statesman quite as great as the respect entertained for him by foreign sovereigns." Thus Henry, without any very startling changes in the law, infused a wholly new spirit into its administration. Old institutions —the Council, Parliament, the common law courts, the justices of the peace—were strengthened, and made to do again their appointed work. And as it was with institutions, so it was with the law. Both alike were gradually permeated by a new spirit without losing their mediæval form and substance; and thus the way was prepared for the evolution of our modern English state and our modern English law.

[1] In 1504 the king, who was ill, issued letters, ordering that all who complained of injury should be heard, but not much good followed, Letters etc. of Richard III. and Henry VII. (R.S.) ii 379; Stubbs, Lectures on Mediæval and Modern History 414; however at the beginning of the next reign some restitution was made in compliance with the terms of Henry VII.'s will; see e.g. L. and P. i no. 1084 for an instance of the cancelling of a recognisance got unduly.

[2] 1 S.T. 283; below 492 seqq.

[3] Busch, England under the Tudors i 288, "The reproach of avarice against the king rests, for the most part, on a confusion between careful orderliness and avaricious niggardliness. There is no doubt that Henry often showed signs of parsimony even on occasions when it was out of place . . . but the failing was not one which belonged to his real nature. It was simply the result of that carefulness he was obliged to exercise in order to establish a sound system of finance after the extravagant prodigality of former times."

[4] Governance of England, Chap. IX.

[5] Letters etc. of Richard III. and Henry VII. (R.S.) ii *xxix*; cf. Busch, England under the Tudors i 290.

[6] Letters etc. of Richard III. and Henry VII. (R.S.) i *xxvii*.

That this gradual development was possible, and continued to be possible, is due in a measure to the foreign policy initiated by Henry, and followed in the main by his successors. For the policy of blind hostility to France he substituted the policy of securing an honourable peace by holding the balance among the European powers; and though foreign policy may seem a topic remote from legal history it is not so in this case. If Henry's successors had not pursued this peace policy, the danger of foreign invasion would have been increased; and if such an invasion had occurred, whatever its ultimate result, it would almost certainly have interfered with the peaceful and continuous development of our institutions and our law. Moreover, another effect of that same policy very directly concerns all departments of English history. For the policy of hostility to Scotland he substituted an alliance, secured by a marriage, which exactly a century later led to the union of the crowns of the two countries.[1] At the same time the celebrated Poyning's law (1495) settled the constitutional relations between England and Ireland for nearly three hundred years.[2]

In Henry VII.'s reign therefore we see foreshadowed the main lines of the Tudor policy, domestic and foreign. It is not an exciting reign; for it is the record of the achievements of an able, cool, business-like man; and the scantiness of contemporary authority keeps us at a distance from him.[3] But it is an important reign in the history of English law, not so much because of the statutes which were enacted,[4] as because it showed that the old institutions and the common law could be made to serve as a basis for the fabric of the modern state. Continuity of development was thus assured; for in England, as abroad, the institutions and the laws adopted in the sixteenth century have been very permanent. Strengthened, modified, and supplemented by Henry VIII. and Elizabeth, they proved sufficient to guide

[1] The king's daughter Margaret married James IV. in 1503.

[2] That English laws then in force were binding in Ireland had been decided in 1485, Y.B. 1 Hy. VII. Mich. pl. 2, overruling a decision to the contrary, Y.B. 2 Rich. III. Mich. pl. 26; Poyning's law enacted this for the law then in force; but it was not so with later statutes unless adopted by the Irish Parliament; the substantial identity of the law in the two kingdoms was however maintained by preventing the Irish Parliament from sitting, or from passing any laws, without the approval of the king and council; see Hallam, C.H. iii 362.

[3] As Stubbs says, Lectures on Mediæval and Modern History 386, it was the age of the discovery of printing and of the use of paper instead of parchment. "Men began to write freely and to destroy freely;" and when the age of destruction began paper was more easily destroyed. Between the Roman Catholic who destroyed what was new, and the Puritans who destroyed what was old not much is left.

[4] Bacon's well-known description of Henry VII.'s statutes, Works vi 92, is obviously exaggerated. The era of important statutes is the last half of the next reign; however, his statutes are in a manner an introduction to many subjects on which there was frequent legislation in this period.

the country through the economic, the social, the intellectual, and the religious changes of this age of Renaissance and Reformation. Economic and social questions had already begun to raise serious problems;[1] but when Henry VII. died (1507) the intellectual and religious questions had not yet become acute. Few could have foreseen that within the next forty years these intellectual and religious questions would have overshadowed all others, and that the first attempts to solve them would have revolutionized the face of English society, and modified the form of the English state.

During Henry VII.'s reign the New Learning had been making its way in England. Some few Englishmen, the most famous of whom were Colet, Linacre, and Grocyn,[2] had studied in Italy; and what they had learnt in Italy they had begun to teach in England. Many came under their influence, of whom the most notable was Sir Thomas More—scholar, Lord Chancellor, and martyr. Many more students had studied at Paris.[3] One of them was William Blount, Lord Mountjoy. He was a pupil of Erasmus; and it was at his invitation that Erasmus paid his first visit to England in 1499.[4] Of the progress of the New Learning in England Erasmus spoke enthusiastically.[5] In fact, it was favoured both by the king and his mother; and, as we might expect, the royal children were educated under its influence. Linacre was tutor to Prince Arthur. Mountjoy was chosen as companion to the future Henry VIII.;[6] and the young prince, if Erasmus is to be believed, early showed signs of precocious genius.[7] Already in England, as in Germany,[8] the New Learning was being turned to theological uses. Colet, who had been made dean of St. Paul's in 1505, had begun to study and expound the Bible and the earlier Latin fathers after a new fashion.[9] He abandoned the scholastic methods, stereotyped by Aquinas, according to which both dogmas and doctrines, and scientific and metaphysical speculations were deduced from the words of isolated texts,[10] and made a real attempt to discover the actual historical meaning

[1] Vol. iii 209-211; below 317, 364, 390-391; cf. Bacon, History of Henry VII., Works vi 93-96.

[2] Seebohm, The Oxford Reformers 14.

[3] Camb. Hist. Lit. iii 7.

[4] Allen, Erasmi Epistolæ i 207.

[5] Ibid no. 118—in England, "tantum humanitatis atque eruditionis, non illius protritæ ac trivilis, sed reconditæ, exactæ, antiquæ, Latinæ Græcæque, ut jam Italiam nisi visendi gratia haud multum desyderem."

[6] Camb. Hist. Litt. iii 8.

[7] Allen, op. cit. i p. 6, "Jam tum indolem quandam regiam præ se ferens, hoc est animi celsitudinem cum singulari quadam humanitate conjunctam."

[8] Above 15-16.

[9] Seebohm, The Oxford Reformers 29-42.

[10] Above 11-12; Erasmus, Praise of Folly, Opera iv 462, 465, cited Seebohm, op. cit. 195-197.

of the biblical narratives, and to apply the ethical message which they contained. His influence had far-reaching effects. It is probable that it was Colet's influence which led Erasmus to devote himself to the preparation of that Novum Instrumentum—the translation of and commentary upon the New Testament—which did so much to further the cause of Reformation.[1] As yet the New Learning and the old theology were outwardly on friendly terms. The old-fashioned and the ignorant might suspect; but the opinions of "obscure men" could be disregarded. The New Learning was opening a new world of ideas to the literary and learned, in the light of which it was hoped the abuses rampant in church and state could be speedily reformed.[2]

All admirers of the New Learning hailed the accession of Henry VIII. as the dawn of a new era. Everything might be expected from a king who professed not to be able to live without literature and learning.[3] Mountjoy's praises were somewhat hyperbolical; but according to the testimony of Erasmus there was some cause for this rejoicing. We may perhaps suspect him of flattery when he is writing to Henry himself or to his ministers;[4] but he is not so open to suspicion when he is writing to a foreign prince. In 1522, writing to George Duke of Saxony, he described the king as "a prince of wonderfully happy and versatile genius, who accomplishes in a manner scarce to be believed whatever he sets his mind to do; moreover he has a literary style which is not displeasing to me."[5] The ambassadors accredited to Henry's court wrote equally enthusiastic reports to their masters;[6] and yet the real character of this man, whom, at his accession to the throne, all the world conspired to praise, is still one of the enigmas of English history.

He began his reign with enormous advantages—an undisputed title, a full treasury, the machinery of government in working order. Both physically and intellectually he was head and shoulders above his contemporaries;[7] and he enjoyed a popu-

[1] Seebohm, op. cit. Chap. XI.

[2] See Colet's sermon to Convocation in 1512, ibid 230-247.

[3] Allen, Erasmi Epistolæ i no. 215—from Mountjoy to Erasmus (1509).

[4] Opera (Ed. 1703) iii nos. 417, 418; the first letter is to Sir Henry Guildford, the master of the horse, the second to Henry VIII.; they are abridged in Froude, Erasmus 244-246; cf. L. and P. ii no. 4115, Erasmus to Henry VIII. (1518).

[5] No. dcxxxv, "Habet enim Princeps ille ingenium mire felix ac versatile, quod incredibili modo valet, quocunque esse intenderit . . . Stylus habet aliquid non abhorrens a me;" cf. L. and P. iv Pt. III. no. 5412, Erasmus to Cochlæus (1529).

[6] Brewer, Reign of Henry VIII. i 4-9; L. and P. iii no. 402, a report of Giustinian (1519).

[7] L. and P. ii no. 395, a letter of Pet. Pasqualigo (1515), "The king is the handsomest potentate I ever set eyes on;" ibid iii no. 402, "He is very accomplished, a good musician, composes well; is a most capital horseman, a fine jouster, speaks French, Latin and Spanish."

larity which was partly due to these natural gifts, and partly to the fact that the nation justly regarded him as their best security against the anarchy from which his father had rescued the country. It was soon seen that the nation was right in trusting a king who, as his character developed, showed himself to be a statesman of the first rank. He could, like his father and his daughter Elizabeth, choose and trust able men,[1] and inspire them with enthusiastic loyalty to himself. He was capable when he wished of supervising, directing, and criticizing the doings of his ministers; and, after the first few years of his reign, he was the real director of their policy.[2] He had a large measure of self-control, and under a bluff manner infinite powers of keeping counsel.[3] He seemed to be able to divine as if by instinct the currents of national feeling, and to shape his course accordingly. He soon learned all the arts of the tortuous diplomacy of the day, and knew well how to use it in such a way that foreign interference should not hamper his policy.[4] His weak points were an enormous belief in his own infallibility, and an obstinacy of temper, which increased as the years rolled on and experience showed him the extent of his strength. Everything must yield to his wishes. What he believed to be right must be right; and opposition to his will, even passive and tacit opposition, he came to regard as a crime.[5] Moreover, he had all the ruthlessness o the Renaissance politician[6]—a ruthlessness which was increased by the keenness of his insight into the realities of his position.

[1] Thus in 1523 he wrote to Wolsey that he is not displeased that Wolsey has changed his opinion, as "nothing in counsel is more perilous than one to persevere in the maintenance of his advice because he hath once given it," L. and P. iii no. 3346.

[2] See L. and P. x no. 699, pp. 291, 292, 293. The minute supervision which he exercised right down to the end of his reign can be illustrated by the manner in which he corrected the wording of important despatches, see e.g. L. and P. xix *ii* no. 509, (1544); and by the alterations he made in the interrogatories to be administered to the Earl of Surrey, S.P. i 891 (1546).

[3] "Three may, quoth he (Henry VIII.), keep counsel, if two be away; and if I thought that my cap knew my counsel, I would cast it into the fire and burn it," Cavendish, Life of Wolsey 258; see L. and P. iii *i* no. 1 for a letter to Wolsey which illustrates this aspect of his character.

[4] Dr. Gairdner says (Camb. Mod. Hist. ii 464), "Henry was considered an enemy of Christianity much as was the Turk, but the prospect of a crusade against him, though at times it looked fairly probable, always vanished in the end. Foreign princes were too suspicious of each other to act together in this, and Henry himself, by his own wary policy, contrived to ward off the danger."

[5] More had accurately gauged this defect in the king's character, as his warning to Cromwell when he entered the king's service shows: He said "in counsel giving unto his Grace, ever tell him what he ought to do, but never tell him what he is able to do. . . . For if the lion knew his strength, hard were it for any man to rule him."

[6] More had seen this also—Roper having congratulated More on the friendliness the king had shown when visiting him at Chelsea, More replied, "I may tell thee I have no cause to be proud thereof. For if my head would win him a castle in France (for then there was wars between us) it should not fail to go."

All through his reign he never spared any one whom he once suspected might be dangerous to his throne;[1] and in that age of unprincipled intrigue his ruthlessness was generally recognized by the nation to be necessary in the interests of the state. In the latter part of the reign the real dangers to his position which were involved in carrying through his Reformation policy tended to make his temper capricious in the extreme. The strain of devising and carrying through the great change told disastrously on his character. The disappointments which he experienced in his matrimonial ventures tended in the same direction. These disappointments were partly his fault—he was an egoist on a royal scale; and partly his misfortune. Many of his children died young; and he was unfortunate in his choice of wives. Thus it was that the darker traits of his character tended to become accentuated in his later years. In fact, the difficulty of forming any clear idea of his character is largely caused by the fact that all through his reign it was constantly developing. He was always learning. He learned from Wolsey, he learned from Cromwell, but he learned most from his own observation and experience. It was only a consummate statesman with a true understanding of the needs of his age, of his own position as king, and of the character of his people, their laws, and their institutions, who could have planned, and induced the nation to accept,[2] the policy of making a Reformation in religion by way of evolution and not by way of revolution; who could have created a modern state upon the basis of mediæval institutions and the common law, and not upon the basis of new institutions and Roman law. Let us by all means condemn his cruelty, his caprice, his selfishness, his ingratitude, his self-righteous egoism; but let us who are telling the tale of the continuous development of English law remember that it was the policy devised by his brain which, in this critical period of Renaissance and Reformation, was the main cause of the preservation of the continuity of that development.[3]

[1] The executions of De La Pole Earl of Suffolk in compliance, it is said, with his father's instructions, of the Duke of Buckingham in 1521 (1 S.T. 287), of the Earl of Surrey in 1547, and the proceedings against the Duke of Norfolk (1 S.T. 451) are obvious illustrations. The destruction of the Pole family in 1538 (Pollard, Henry VIII. 373) was caused by dynastic reasons, quickened by fear of the effects of the Pope's bull of deposition; as Chapuys said in 1533, the divorce question "sharpened the thorns of the Roses," L. and P. vi no. 465, p. 209.

[2] As Prof. Pollard says (Henry VIII. 413), "Henry retained to the last his hold over the mind of his people;" thus Chapuys reported in 1546 that, "No man there (i.e. in Parliament) dare open his mouth against the will of the king and Council," L. and P. xxi *ii* no. 756.

[3] Dr. Gairdner says (Camb. Mod. Hist. ii 462), "Henry VIII. was really a monarch of consummate ability, who, if his course had not been misdirected by passion and selfishness, would have left a name behind him as the very founder of England's greatness."

I must now indicate briefly the manner in which Henry VIII. guided England through the earliest and, from some points of view, the most critical stage of the transition from mediæval to modern.

During the earlier years of Henry's reign the policy of the state was directed by Wolsey.[1] He was above all a foreign minister, with a perfect understanding of those new conditions of foreign politics which More satirized in his *Utopia*. From him Henry soon learned to abandon his early wish to make showy expeditions against France, and to assume the position of the custodian of the balance of power in Europe. During the period of Wolsey's rule the government was efficiently carried on on the lines marked out in Henry VII.'s reign.[2] The chief organs of government were the Council and its various branches, the Star Chamber, the Chancery, and the Court of Requests; and Henry VIII., like his father, governed by agents whom he promoted for their ability. Wolsey distrusted Parliaments.[3] In fact the infrequency of Parliaments during the period of his ascendancy, and the large part played by the Council and its branches and the newer courts closely connected with the Council, caused the government of England at this period to approximate more closely than at any other time to a government of the continental type.

Both Wolsey and his master agreed upon the necessity of keeping the new heresies out of the kingdom. Both favoured the new learning. Wolsey's idea was to allay the unpopularity of the church and to promote learning by judicious reforms from within; and these reforms he was in a position to effect by the use of his legatine powers. The suppression of certain monasteries for the foundation of his colleges at Ipswich and Oxford shows the kind of changes which he was prepared to make.[4]

[1] L. and P. iii no. 402, Giustinian reported in 1518 that he, "rules both the king and the entire kingdom;" cf. L. and P. ii *ii* no. 4438.

[2] In 1517 Wolsey writes to Henry VIII. (L. and P. ii Pt. 2 App. no. 38), "and for your realm . . . it was never in such peace and tranquility; for all this summer I have had nother of riot, felony, ne forcible entry, but that your laws be in every place indifferently ministered. . . . Albeit there hath lately . . . been a fray betwixt Pygot your sergeant and Sir Andrew Windsor's servants, for the seisin of a ward . . . in the which fray one man was slain. I trust at the next term to learn them the law of the Star Chamber, that they shall ware how from thenceforth they shall redress their matters with their hands. They be both learned in the temporal law, and I doubt not good example shall ensue to see them learn the new law of the Star Chamber;" even in the North all was quiet, ibid no. 3346; all through the period the Council was strict in repressing disorderly conduct in the nobility; thus in 1543 the Earl of Surrey was before it for breaking windows in the City, L. and P. xviii *i* nos. 347, 356.

[3] In 1515 we find Wolsey advising a more speedy dissolution, L. and P. ii no. 1223; see Hallam, C.H. i 17, 18 for his attempt to overawe the House of Commons in 1523; Henry's management of the House was very different, below 36, 90-99; and cf. 453-455.

[4] L. and P. iii no. 251 (1519) Erasmus says that "The cardinal of York has done much to restore all good studies, and by his bounty invites all men to the pursuit of them."

But his time was too fully occupied with foreign affairs, and with his administrative and judicial duties at home, to allow him to deal adequately with the position of the church in England. So long as his ascendancy lasted the position of the church was secure against violent changes;[1] but for many various causes he was becoming increasingly unpopular. The need for money came to be felt as soon as Henry's extravagance had dissipated the savings of his father. Money was collected by means of forced loans and benevolences at different periods in the reign; but these expedients caused a rising in 1525.[2] In the Parliament of 1523 the taxes which Wolsey obtained were much less than he had demanded; and these exactions, parliamentary and unparliamentary, caused him to be hated by the nation at large.[3] The nobility hated him as an upstart and disliked the good order which he kept in the kingdom, by the help of "the new law of the Star Chamber."[4] The orthodox looked with suspicion upon his attempts to reform some of the abuses in the church. Those whose views were, for doctrinal or other reasons, anti-ecclesiastical, pointed to his arrogance, his display, and his lax morals. The common lawyers viewed with jealousy the efficient rival courts which were absorbing the legal business of the state.[5]

Wolsey's power rested on the king alone; and when, on the failure of the divorce negotiations, the king withdrew his favour, his fall was inevitable.[6] For some years past the king had been gradually assuming a greater control over the government, and forming definite views as to its conduct.[7] In foreign politics the

[1] In 1528 Campeggio wrote that Wolsey deserved well of the Pope and the Holy See, "which, owing to his vigilance and solicitude, still retains its rank and dignity here and elsewhere," L. and P. iv no. 4898.

[2] Hallam, C.H. i 18-21, 23-25; see L. and P. iv *lxxxiv* nos. 1318, 1319, 1321.

[3] See the articles against Wolsey from Herbert in L. and P. iv no. 6075; Co. Fourth Instit. 89-95; in L. and P. iv no. 5750, there is a long account of Wolsey's career and doings, composed perhaps for the purpose of drawing up these articles against him.

[4] Above 33 n. 2.

[5] Fourth Instit. 91, 92, §§ 20, 21, 26, "He hath examined divers and many matters in the Chancery after judgment thereof given at the common law, in subversion of your laws. . . . He hath granted many injunctions . . . and by such means he hath brought the more part of the suitors of this your realm before himselfe . . . he hath sent for the judges and by threats commanded them to defer judgment;" cf. Lord Darcy's complaint, at the time of Wolsey's fall, of the Council of the North, Reid, the King's Council in the North 111, 112.

[6] In Oct. 1529 the Bishop of Bayonne reported that the king had taken the management of everything, and that Wolsey's fall was inevitable, L. and P. iv no. 5983; cf. ibid nos. 5582, (May 22) 5803 (July 30).

[7] Ibid iii no. 576, a memorandum concerning the administration of the King's affairs (1519)—various subjects are mentioned which the king will debate with his Council, and the Chancellor and Judges are to make quarterly reports to the king in person; ibid iii no. 1713 (1521), Pace tells Wolsey that the king "readeth all your letters with great diligence," and describes how he had in person dictated an answer; ibid iv *iii* no. 5983 the Bishop of Bayonne said, "The king takes the management of everything."

great lesson which he had learned from these years of diplomatic intrigue was the lesson that, if he maintained an adequate navy,[1] he had little to fear from foreign interference. At home he saw clearly enough the growing feeling against papal and, indeed, against all forms of ecclesiastical jurisdiction.[2] He saw, too, that by a strict enforcement of the old statutes—notably the statute of Præmunire—he could, with the general applause of the nation, make himself supreme in his realm;[3] and the case of Dr. Standish proves that long before the divorce question arose[4] he was inclined to assert a larger power over the clergy.[5] The Defender of the Faith did not desire to encourage heresy. But he did desire to encourage the New Learning and the reform of ecclesiastical abuses.[6] Without the divorce there would have been a modification in the relations of church and state. The divorce determined the shape which that modification actually assumed. As the divorce could not be got at Rome it must be got in England. Therefore the power of the Pope—even his purely spiritual power—must go.

Henry had been taught by Wolsey's experience the necessity of learning to work with a Parliament. If it was necessary to work with a Parliament in order to raise supplies, still more was it necessary to work with a Parliament in order to carry through such a change as the entire repudiation of the papal authority. Though the divorce was unpopular,[7] the repudiation of the papal

[1] For Henry's interest in the navy see Pollard, Henry VIII. 126-128 and references there cited: vol. i 546-547.

[2] In 1515 FitzJames, bishop of London, told Wolsey that a jury in London would condemn any clerk though he were as innocent as Abel, L. and P. ii no. 2; a good illustration of this state of feeling is to be found in the Beggar's Petition, Somers Tracts (Ed. 1809-1815) i 41-48; cf. L. and P. i no. 5725 (1514); ii *i* no. 1315 (1515); iv no. 6183.

[3] Standish's case, Keilway (1515) at pp. 184, 185; L. and P. ii no. 1314 (1515), the answer of convocation to the king; Maitland, Canon Law in the Church of England 87-89.

[4] As to the date when Henry began to entertain scruples as to his marriage see L. and P. iv Pref. *ccxxi-ccxxv*.

[5] In 1518 Pace writes to Wolsey (L. and P. ii no. 4074) with reference to the king's promotion of Standish, "Erit tamen difficile huic rei obstare . . . quia majestas regia illum mihi jampridem laudavit ex doctrina, et omnes isti domini aulici eidem favent de singulari quam navavit opera ad ecclesiam Anglicam subvertendam."

[6] For Henry's support of Colet, in 1519, as told by Erasmus, see L. and P. iii no. 303; in 1546 the University of Cambridge wrote to the Queen to beg her intercession with the king on behalf of the colleges which seemed to be threatened by the Acts for abolishing Chantries etc.; in her reply she says, "His Highness, being such a patron to good learning doth tender you so much that he woll rather advance learning and erect new occasions thereof, than to confound those your ancient and godly institutions, so that learning may hereafter justly ascribe her very original, whole conversation and sure stay to our Sovereign Lord."

[7] In 1532 two members of the House of Commons moved that the king should be petitioned to take back his wife; "these words," says Chapuys, "were well taken by all present except two or three," L. and P. v no. 989; cf. ibid nos. 941, 1202.

authority, the removal of some of the many abuses of the ecclesiastical courts, and the prospect of getting hold of ecclesiastical property, were projects extremely attractive to a large part of the nation.[1] In the Reformation Parliament (1529-1536) Henry gradually worked out the constitution of a national church with himself as supreme head,[2] and by deft Parliamentary management[3] he partly persuaded[4] partly forced[5] the houses to give it legislative sanction. This national church was not to be a heretic church. It was to be the historic Catholic church of England restored and reformed. There was only to be so much change as was needed to adapt the mediaeval universal church to the wants of the new territorial state. The power of the Pope was exchanged for the supremacy of the king—the new papacy Chapuys aptly called it;[6] and the papal canon law, so far as it was inconsistent with the new order, ceased to be applicable. Subject to these necessary modifications there was to be little change in doctrine, discipline, or organization.

The destruction of the monasteries followed hard upon this Reformation of the church. No one now believes that all the monasteries were so corrupt as Henry's visitors would have us believe; but it is clear that their usefulness had nearly gone.[7] Voluntary offerings had nearly ceased; and the new foundations made by churchmen at the end of the fifteenth and in the sixteenth

[1] L. and P. iv no. 6011 (1529), Du Bellay reports to Montmorency that after Wolsey is dead or ruined the great lords will impeach the state of the church and take its goods—"which it is hardly needful for me to write in cipher, for they proclaim it openly;" in the same year Wolsey plainly told the Pope that none of the king's subjects would tolerate papal interference with the prerogative, and that "desire to please the Emperor at all hazards will alienate this realm from the Holy See," ibid no. 5797.

[2] Vol. i 589-593.

[3] Thus in 1531 Chapuys reports that all are weary of the Parliament; and that those who take the Queen's part find it easy to get leave of absence, L. and P. v no. 120.

[4] In 1532 the king sent for the house and made a speech justifying the divorce in consequence of the motion that he should take back his wife, L. and P. v no. 989; in 1534 all the Parliament was with the king at York House for three hours, and afterwards all the lords went to the council house at Westminster and sat there till ten at night, L. and P. vii no. 304.

[5] Chapuys tells us of the rejection of the annates bill by the Commons in 1532; the king then demanded a division—"some passed to his side for fear of his indignation, so that the article was agreed to, but rather more moderately than was proposed," L. and P. v no. 898; in some cases fear of the rupture of commercial relations and interference with the wool trade induced some members to vote against a complete break with the Pope, L. and P. vi no. 296.

[6] Ibid v no. 114 (1531); cf. ibid no. 1013 (1532); see Maitland, English Law and the Renaissance 60-62, for the use made of Marsiglio's *Defensor Pacis* to support the new settlement; for the Injunctions by which Henry used his new supremacy see Tanner, Constitutional Documents 93-94; for later Injunctions of 1547 and 1559 see ibid 100-102, 140-141.

[7] For a good short account of this controversial question see Tanner, Constitutional Documents 50-57; see also below 42.

century showed that in their opinion, "the future lay with collegiate life and the New Learning."[1] Their destruction was not a logically necessary consequence of Henry's new settlement; but it was practically a necessary condition of its stability. If they had been allowed to stand they would have been centres of intrigue against his new settlement.[2] By destroying them Henry not only deprived his enemies of a weapon: he was able to arm himself with that weapon. Their wealth could be used to give the governing classes, many of whom viewed these vast changes with apprehension, a large pecuniary interest in the maintenance of the new settlement.[3] Many suggestions were made then, and have been made since, as to the manner in which the wealth of the monasteries should have been used.[4] Henry's practical sagacity in distributing large parts of it among the nobility and gentry was proved when the project of reconciliation with Rome was brought before Parliament in Mary's reign. It was then clear that the pecuniary interests of the governing classes were the greatest obstacle to any attempt to restore the older order.

The development of a national Catholic Church from that branch of the mediæval Roman Catholic Church which was situated in England was an enormous step in the consolidation of the state. The king who had thus settled the relations of church and state on the basis of continuity desired also to create a united nation on a similar basis. His policy with regard to Wales and Durham shows that he wished to make these outlying parts of the British Isles integral parts of one united state. In Durham the independent judicial system of the Palatinate was preserved; but justice was, under the Act of 1536, administered in the king's name.[5] Into Wales and the Marches all the apparatus of English local government was introduced—county courts, tourns, hundred courts, sheriffs, justices of the

[1] Tanner, op. cit. 57.

[2] Suppression of the Monasteries (C.S.) 61, 62, Legh writes to Cromwell that the Abbot of Rivaulx denies the royal jurisdiction, and would seem, "to rwele the king by ther rulles;" and that this "rebelliouse mynde . . . is soo radicate, not only in hym, butt also in money of that religion."

[3] In 1534 Chapuys reported to Charles V. that the king intends "to usurp part of the Church goods and distribute the remainder to noblemen," L. and P. vii no. 114; later in the same year he reports that the greater part of the ecclesiastical revenues are to be distributed among the gentry "to gain their good will," ibid no. 1141; see Grey Friars Chronicle (C.S.) 73 for a curious tale of how Sir Miles Partridge "playd wyth kynge Henry the VIII. at dysse for the grett belfrey that stode in Powelles Church-yerde;" cf. H. A. L. Fisher, Political History of England 497-499.

[4] Suppression of the Monasteries (C.S.) 262-265; see L. and P. xiv *i* no. 871 (1539) for a proposal to set up something like a standing army with a court of its own to look after it.

[5] Vol. i 112-113; 27 Henry VIII. c. 24.

peace, coroners, and escheators;[1] and Wales was given Parliamentary representation.[2] And, it would seem that Henry's policy with regard to Wales had had by the end of the century a very considerable success.[3] Both Durham and Wales were, it is true, governed by branches of the Council; and by a clause of an Act of 1543[4] the crown acquired, till 1624[5] a large power to alter the laws of Wales by the prerogative. But, as in England, it was through the ordinary machinery of government that the Council ruled.[6] All through Henry's constitutional policy we find this note of continuity. It is in harmony with that strict observance of the letter of the law which was so strikingly exemplified in the divorce proceedings, and in many of his most arbitrary doings. As I have said before, this feature of Henry's character and policy has been a main factor in preserving the continuity of the English constitution; and we shall do well to bear it in mind when we come to deal with the legal developments of the reign.[7]

We have seen that throughout Europe the Reformation helped forward the growth of the modern territorial state.[8] Nowhere was this result so conspicuous as in England. But in England, as abroad, it seemed at first as if the upheaval of things established would be fatal to its growth. The various demands put forward by the rebels in the Pilgrimage of Grace[9] showed that religious dissent was allying itself to many various elements of opposition to the government of the state—to feudal opposition, to the claims of the older courts and the older law, to the demand

[1] 27 Henry VIII. c. 26; 34, 35 Henry VIII. c. 26; Skeel, The Council in the Marches of Wales 41-46; vol. i 123-124. Some, among others Lee, doubted the wisdom of this policy, see L. and P. x no. 245—"But in spite of Lee's disapproval, the changes proceeded, and his gloomy forebodings were not fulfilled," Skeel, op. cit. 72-74.

[2] 27 Henry VIII. c. 26 §§ 28, 29; it may be noted that Henry also summoned representatives from Berwick and Calais, Porrit, The Unreformed House of Commons, i 373.

[3] A book entitled "Commentarioli Britannicae Descriptionis Fragmentum" (1572), by Humphrey Lloyd of Denbighshire, describes the changes brought about since Henry VIII.'s legislation; he says, "Immunes ab omni servitute et Anglis omnibus in rebus consimiles fecit. Quibus rebus effectus est ut mores antiquos exuti, qui parcissime vivere solebant, nunc ditiores facti, Anglos victu et vestita imitantur, quamvis laboris impatientes, et nimium de nobilitate generis gloriantes, regis et nobilium famulitio potius quam manuariis artibus seipsos deddunt. Unde fit ut paucos per totam Angliam invenies nobiles quorum famulitii . . . magna pars non sit de Cambria oriunda." He then goes on to say that, "nullus sit adeo pauper quin liberos suos aliquo tempore scholas ad litteras discendas tradit, et qui studio proficiunt, in Academias mittentes Juri civili pro majore parte operam dare compellunt. Unde evenit, quod major pars eorum qui in hoc regno Jus civile aut Pontificum profitentur Cambri natione sunt." I owe this reference to Mr. W. H. Stevenson of St. John's College.

[4] 34, 35 Henry VIII. c. 26 § 59.

[5] 21 James I. c. 10.

[6] 34, 35 Henry VIII. c. 26; vol. i 111-112, 124.

[7] Below 283-284.

[8] Above 19-21.

[9] For these see L. and P. xi no. 1246.

for Parliamentary control over the government, to agrarian discontent. The rebellion took place in the north of England where feudal relations and feudal ideas still survived, and in its sudden gathering and equally sudden dispersal it followed the usual course of such a rising. The rebels complained of the "vile blood" in the Council, and of the new courts which were making on a whole a successful attempt to keep the peace and to administer an even-handed justice.[1] They wished to see not only the old religion restored, but also the mediæval common law unfettered by Chancery injunctions,[2] which, as we have seen, a turbulent nobility could so easily make the cloak of oppression and misrule.[3] Moreover, they demanded a free Parliament; and, as no minister of the king was to have a seat in it,[4] they doubtless hoped that they would be able to manipulate it as they pleased.

The suppression of this rebellion by the help of a characteristic combination of diplomacy and force ensured the success of Henry's religious settlement; and went far to destroy the political influence of the northern nobility.[5] But its maintenance during the rest of his reign required delicate diplomacy both in foreign and domestic affairs. Henry did not desire an alliance with foreign Protestants—the Act of the Six Articles reaffirmed most of the leading doctrines of the Roman church.[6] But at one time fear of a coalition of foreign Catholic powers drove him to seek this closer alliance, and to marry Anne of Cleves. But so soon as the political horizon cleared he made haste to repudiate her, and to destroy Cromwell, who had brought about the marriage which was to have cemented this alliance. On the other hand, there were no thoughts of making peace with Rome. The translated Bible which was set up in the parish churches, the laxity with which the Act of the Six Articles was enforced in the latter years of his reign,[7] and the composition of the council which he nominated for his infant son,[8] showed that reforming tendencies still held their ground. But perhaps the best proof of this is the continued influence of Cranmer. In him the king had found an archbishop whose intellectual and literary gifts enabled him to give perfect effect to the royal ideal of a gradual Reformation

[1] L. and P. xi no. 826.
[2] Ibid no. 1246 § 22, "that the common laws may have place as was in the beginning of the reign, and that no injunctions be granted unless the matter has been determined in Chancery;" cf. ibid no. 1182 § 7 for a similar demand made at the Conference at Pomfret; ibid xii *i* no. 6 p. 9.
[3] Vol. ii 415-418.
[4] L. and P. xi no. 1182 (16).
[5] Ibid xii *i* Introd. xxi, xxii and nos. 636, 667, 595.
[6] Vol. i 593; 32 Henry VIII. c. 14.
[7] As to this see Gairdner, Camb. Mod. Hist. ii 466, 467.
[8] Pollard, Camb. Mod. Hist. ii 475.

with the minimum of violent change; for he was a man whose "feet stood upon the past, but his outlook was towards the future."[1]

The events of Edward VI.'s and Mary's reigns, are the best proof of the wisdom and capacity of Henry VIII. The nation was not ready for sweeping religious changes on a large scale, especially when these changes were made by a corrupt government which failed to keep the peace at home, and diminished the reputation of the country abroad. Somerset had a belief in human nature and a disinclination to face the stern realities of life which are characteristic of the socialistically minded statesman. He was too benevolent to use the coercive measures needed to maintain order in that turbulent time. He allowed rebellion to become dangerous, and was deservedly deposed. But his successor, the Duke of Northumberland, was hardly an improvement. Somerset was at least honest: Northumberland was an utterly unprincipled time server. His main object was to obtain the crown for his family, and, by playing upon the young king's religious prejudices, he secured his consent to the scheme. Fortunately Edward died before Northumberland's plans were mature; and the nation rallied to the rightful heir.[2] Something had however been effected. The church had got its articles and its liturgy; and they formed, with but slight modifications, the basis of the final settlement in Elizabeth's reign.[3] Unfortunately the work was pressed forward with injudicious haste; and it suffered from its connexion with an incompetent government. But the Roman Catholicism of Mary was as displeasing to a large part of the nation as the extreme Protestant policy of her brother.[4] The distribution of the monastic lands had, as we have seen, given the governing class a pecuniary interest in the maintenance of Henry VIII.'s settlement. The translated Bible, which Henry had permitted, assisted by the Protestant teaching of the last reign, had led to the rise, in some parts of the country, of a genuine enthusiasm for some kind of reformed religion; and this was fostered by the heroism of the Protestant martyrs. The Queen's foreign policy, which made England a satellite of Spain, was even more unpopular than the foreign policy of the preceding reign;

[1] Camb. Hist. Lit. iii 33; for his liturgical learning and the manner in which he used it to construct the prayer book see Tanner, Constitutional Documents 107-108.

[2] Grey Friars Chronicle (C.S.) 79, when Jane was proclaimed Queen in London, "fewe or none seyd Good save hare;" on the other hand, when the Duke of Northumberland was led through the streets of London as a prisoner, "all the streetes were full of people which cursed him and callinge him traytor without measure," Wriothesley's Chronicle (C.S.) ii 90, 91.

[3] Vol. i 593-594; below 45.

[4] When at the beginning of the reign Dr. Borne, preaching at St. Paul's cross, prayed for the souls of the departed, and declared that Bonner was wrongfully imprisoned, there was a serious riot.

and it was quite as disastrous. All classes welcomed Elizabeth —the offspring of the marriage which was the immediate occasion for that settlement of the national church to which the large majority of moderate men desired to return. But before I can deal with the results of her reign I must first say something of the progress of the Renaissance during the reigns of her three predecessors.

Henry VIII. aimed, as we have seen, at reconstructing the English state and the English church upon mediæval foundations, and with such mediæval materials as were capable of being adapted to the new edifice. Our modern English constitution and our established church are living witnesses to the successful realization of his aim. But what appears to us, and what appeared to the men who lived at the end of the sixteenth century, to be a Reformation, was, for the men of Henry's own day, a Revolution. Henry no doubt carried through his programme of reform with the minimum of disturbance to things established. But necessarily the shock to the existing order was great; and it seemed temporarily to stop the progress of the Renaissance.

The earlier years of Henry's reign had not wholly belied the expectations of the supporters of the New Learning. Erasmus said that there were more men of learning to be found in Henry's court than in any university[1]—that it was rather a museum than a court.[2] As we might expect, therefore, the New Learning was encouraged at both the universities. Bishop Fisher, the patron of Erasmus, was chancellor at Cambridge; Sir Thomas More at Oxford. Colet founded St. Paul's School that boys might be educated in Latin and Greek after the new fashion. Wolsey designed, as we have seen, both a school at Ipswich and a college on a grand scale at Oxford. More direct and more detailed evidence of the actual permeation of the new ideas is to be found in the accounts of John Dorne, an Oxford bookseller.[3] In the year 1520 he sold 2383 books. Their titles show that there was a demand for books of scholastic philosophy and theology, for the classics, and for the works of three Italian and one French humanistic writer; but that the greatest demand of all was for the works of Erasmus—"one-ninth of the whole sales were of books written or edited by him." Here as abroad this silent permeation of the new ideas was checked

[1] L. and P. iii no. 251, Erasmus to Bannisius (1519).

[2] Ibid ii no. 4340, Erasmus to Bombasius (1518), "Thomas Linacre is king's physician; Tunstal, Master of the rolls; More, Privy councillor; Pace, secretary; Mountjoy, chamberlain of the household; Colet, preacher; Stokesley, who is well versed in the schoolmen, and intimately acquainted with three languages, confessor. It is a museum more than a court."

[3] Camb. Hist. Lit. iii 19, 20.

by the Reformation, which filled men's minds with theological controversy to the exclusion of all else. Then came the dissolution of the monasteries and the wholesale destruction of the monastic libraries. This was the most direct and the greatest shock to learning. It was not merely a destruction of books, it was a dislocation of the whole existing system of learning and education. Some of the monasteries were at once the homes of advanced learning, international exchanges for European scholars, and centres of elementary education for the surrounding country.[1] Many of the Oxford and Cambridge colleges were monastic foundations for the education of monks and friars. "Of these scholars the numbers were so large that in the century previous to the Reformation one in nine of all graduates seems to have been a religious."[2] After the dissolution of the monasteries the numbers at the two universities gradually declined, and did not rise to their old level till the nation began to settle down under Elizabeth.[3]

But here as abroad there is substantial gain to set against loss. The quantity of learning and the number of students might decline, but what learning there was, and what students there were, belonged to the new order. The old learning was displaced—violently, it is true; but it is doubtful if it could have been so thoroughly displaced with less violence. Henry VIII. was, as we have seen, a great constructive statesman in the realm of constitutional law; and though he was bound to destroy much that was out of harmony with his new ideas as to the supremacy of the state, though this involved a destruction of much of the material of the old learning and of much of the machinery by which it was disseminated, his work was not merely destructive in the sphere either of religion or of learning. We have seen that the forms and much of the substance of the old religion were maintained; and the beginnings of a new order were beginning to appear in the translated Bible and the litany. The foundation of regius professorships at Oxford and Cambridge was intended to bring the universities and their teaching into line with the new order in church and state, so that they might "be nurseries to bringe up youthe in the knowledge and fear of God and in all manner of good learninge and vertuous educacion whereby after they may serve their Prince and contrye in divers callinges."[4]

[1] Camb. Hist. Lit. iii Chap. iii; cf. Hallam, Hist. Lit. i 351, 352 for another view, which minimizes perhaps unduly the shock given to learning.

[2] Camb. Hist. Lit. iii 51. [3] Ibid 51, 419.

[4] This view of the functions of the universities is contained in a letter from the Council written in 1593 to the Vice-chancellors of Oxford and Cambridge forbidding plays, Dasent xxiv 427, 428.

This work of reconstruction, though hindered by the rapacity which characterized the court of Edward VI., rapidly advanced during his reign. New statutes were made for the universities; and intercourse with the Protestants of the continent more than made up for the cessation of intercourse with Catholic countries. Cambridge especially, in the time of Cheke and Smith and Ascham, was the home of the best kind of humanism;[1] and from Cambridge came many of Elizabeth's most eminent statesmen. The accession of Mary meant the death or exile of the teachers who had flourished under her brother. But Mary herself was not indifferent to learning. It was in her reign that St. John's and Trinity Colleges were founded at Oxford. But though it might be possible to restore the old religion, it was both politically and intellectually impossible to bring back the old learning in its entirety; and it was very difficult to proceed in the work of introducing the New Learning so modified as to be consistent with Roman orthodoxy. It was not till Elizabeth ascended the throne that the work of reconstructing learning and religion began again to advance slowly on the path which had been marked out for it in the reigns of Henry VIII. and Edward VI.[2]

When Elizabeth succeeded to the English throne the two greatest powers on the continent—France and the Spanish Monarchy—were beginning to think of concluding peace in order to withstand the progress which the Reformation was making. A few months after her accession peace was actually made by the treaty of Cateau Cambresis. This desire for peace was caused, not so much by the fact that the Protestants were heretics, as by the fact that the Calvinistic form of Protestantism which was arising at Geneva demanded civil as well as religious liberty; and, as we have seen, somewhat easily allied itself with any existing elements of discord in the state. In Scotland, in France, and in the Netherlands this leaven was working; and its repression seemed to the rulers of these countries to be the first essential for the continuance of orderly government. A counter-reformation was necessary in the interests both of church and state.[3] But dynastic rivalries which had lasted for upwards of half a century could not be forgotten in a day; and though political and religious necessities might dictate a peace, the influence of these rivalries prevented any whole-hearted co-operation in the work of

[1] Hallam, Hist. Lit. i 346-350.

[2] In a tract called "The Device for the alteration of religion," put forward at the beginning of Elizabeth's reign, Somers Tracts i 63, it is said that, "the Universities must not be neglected, and the hurte that the late visitation in Queen Marie's time did, must be amended."

[3] Above 16-17, 19; T. G. Law, Camb. Mod. Hist. iii 260.

suppressing heresy. The kings of France and Spain were willing enough to destroy their own Protestant subjects; but if the Protestant subjects of either of these powers made it easier for the other to pursue schemes of territorial aggrandisement, the temptation to remain passive, and even to assist them to embarrass their rival, was often too strong to be resisted. In spite of treaties, in spite of the counter-reformation movement, the same jealousies which had enabled Henry VIII. and Edward VI. to act in defiance of the opinion of Catholic Europe could be relied upon to protect England against any combined attack from the two great Catholic powers on the continent. It was a thorough knowledge of the very mixed motives governing the actions of continental statesmen, and the skilful use made of that knowledge, which enabled Elizabeth and her advisers to solve successfully the multifarious problems of the first years of her reign.[1]

In the first days of her reign Elizabeth had determined to stand by that Reformation settlement to which by her birth she was naturally related. By choosing as her ministers such men as Burghley, Bacon, Cooke, and Smith, who, like herself, had been educated under the influence of the Renaissance and in the principles of the reformed religion, she showed that she meant to build upon the foundations which had been laid by her father and her brother.[2] But as a result of this decision the foreign policy to be pursued became a problem of the greatest difficulty. During the preceding reign England had been a dependent of the Spanish monarchy. Scotland, on the other hand, had become a dependent of France. Mary Queen of Scots, who by hereditary right was the next heir to the throne of England, and in the opinion of many Catholics the rightful queen, was the wife of the Dauphin; and in 1559 her husband succeeded to the throne of France as Francis II. If England was to remain independent of France must she not continue to be dependent upon Spain? And, with dependence upon Spain, must not the determination to stand by the Reformation settlement be abandoned? But, as Elizabeth and her advisers saw, there was another side to the picture. England was still important to Philip; and, Reformation or no Reformation, he could not allow her to be absorbed by France, for it would imperil his dominion in the Netherlands.[3] Further, a tumultuous popular Reformation of the Calvinistic variety had begun in Scotland. The Scotch might hate the English; but a powerful party had come to hate Catholicism, and

[1] In "The Device for the alteration of Religion," Somers Tracts i 62, it is proposed to make peace with France, and divide Scotland by supporting the Reformation there; cf. Sorel, op. cit. 56-57.

[2] Maitland, Camb. Mod. Hist. ii 559.

[3] Ibid 578; iii 265.

the French power by which Catholicism was supported, still more fiercely. Much could be done to cripple France if the Scotch Reformation was assisted; and, most important of all, it was clear that, if that Reformation was carried through, the old alliance between France and Scotland would be broken up. Thus it was that Elizabeth and her ministers found in the European conflict of religious and dynastic interests the solution of the difficulty caused by the decision to adhere to the Reformation settlement. But under the circumstances there was no need to parade its anti-papal or its Protestant character. Both the Henrician and the Edwardian settlement were toned down and adapted to the new situation. Henry's extreme claims to the headship of the church were disguised by an *et cetera* in the royal style; and the Calvinism of some of Edward's formularies was modified.[1] At the same time the authority of the Supreme Governor of the English Church was quite sufficient to check the zeal of the more advanced Protestants, whose views were as distasteful to Elizabeth as they were to Philip II.;[2] and the notes of Catholicity still retained by the English church served on occasion as a valuable diplomatic weapon. In fact, that church could present many faces; and no party need despair of converting the Queen to its views. She was capable of making the most artistic use of the opportunities which were open to her;[3] and so, amid a maze of tortuous diplomacy which helped to screen the real facts from those who did not wish to see them, England was placed definitely on the side of the Reformation, but without an open break with the Catholic powers of the continent. The Reformation in Scotland was saved; and its salvation not only guaranteed the independence of England, but laid the foundation of a union between the two countries.

The problem of the relations between England and Scotland was intimately related both to the ecclesiastical and to the foreign policy of Elizabeth. The manner in which she dealt with it strikes the keynote of her foreign policy during the first thirty years of her reign. The difficulties and rivalries of foreign states must be used to secure peace for England, and a breathing space in which an attempt could be made to solve the many pressing religious, commercial, and social problems which had been shelved during the last two reigns. Peace was the first essential; and all Elizabeth's foreign policy was directed, and for thirty years successfully directed, to this object.

[1] Maitland, E.H.R. xv 120 seqq.; Camb. Mod. Hist. ii 562, 563, 569, 570.

[2] Elizabeth never forgave Knox his "Blast of the trumpet against the Monstrous Regiment of Women;" and "Not only had the 'regiment of women' been attacked, but Knox . . . had advocated a divine right of rebellion against idolatrous princes," Maitland, Camb. Mod. Hist. ii 596.

[3] Cf. Maitland, E.H.R. xv 330.

"Time and myself are a match for any two," was a favourite proverb of Philip II. It might be taken as the motto of Elizabeth and Burghley. Time gave them many opportunities, and they took them all. The tragedy of Mary Queen of Scots, and the wary policy of Elizabeth, secured Scotland for the Reformation, and opened the way for that union of the crowns which had been the dream of her father and grandfather. The revolt of the Netherlands, the struggle with the Turks, the winning of the Portuguese inheritance, fully occupied Philip, and made him as ready as Elizabeth to avoid an open rupture. The power of France was to a large extent neutralized by the religious wars. When Elizabeth was not assisting or conniving at assistance given to the Huguenots, she was dangling the prospect of an alliance cemented by a marriage with herself before the French court. She had soon seen the diplomatic value of her celibacy; and, with greater wisdom than her Parliament, she steadily refused either to marry or to declare her successor. But in spite of the skilful use which she made of the troubles and rivalries of the continental powers, the undercurrent of hostility between the country which was rapidly becoming the first of the Protestant powers, and the country which stood for Catholic orthodoxy, was growing more intense. Philip did not consider that the time had come to declare war on England, but he had no objection to encourage the plans of revolution and assassination that centred round Mary Queen of Scots. Elizabeth wished for peace, but she had no desire to see the Netherlands crushed. They were fighting the battle of Protestantism; and she had no objection if her subjects assisted them. Nor had she any objection to the semi-private expeditions of a piratical character which taught Drake and his fellows to despise the Spanish monarchy and its claim to exclude all other nations from the New World. That Elizabeth had co-operated with Time more intelligently and more successfully than Philip became clear when the execution of Mary Queen of Scots and the possibility of securing England and Scotland as her heir, at length persuaded him that his rebellious provinces could not be subdued until England was first conquered. The safety of the Reformation was assured when the destruction of the Armada advertised to the world the beginning of the decadence of that power which had so long threatened to become the master of Europe and the New World. Throughout the remaining years of the reign, indeed, the war continued; and when it closed there still remained to be fought out in Germany the last, the longest, and the most savage of all the wars of religion. But when Elizabeth died there had emerged from the heroic struggle of the United Provinces, from the settlement of

the religious wars of France, and from the revival of the power of England, the main features of the modern European system of international politics and laws.

Similarly there were emerging from Elizabeth's ecclesiastical policy some very permanent factors in the political and religious life of modern England.

Her religious settlement satisfied many both at home and abroad.[1] In so far as all allegiance to the Pope was disclaimed the English church was Protestant. But it retained, according to the orthodox legal and theological doctrine, both its continuity and its Catholicity.[2] The violence of the change was skilfully disguised by the fiction of the restoration of an old independence. What in another and a larger sphere the fiction of a state of nature had done for the Roman *jus civile* in our smaller and insular sphere this fiction of an old independence ultimately did for the Reformation settlement in England. It enabled large and necessary changes to be effected with the minimum of external change. It made for peace and orderly development. Its Protestant character satisfied the moderate majority; and the continuity of its Catholicity, propounded in Henry VIII.'s statute, and accepted first by the lawyers and afterwards by the theologians, has, like the Catholicity of the Roman church, enabled it to include within itself numerous divergent sects. But though Elizabeth's settlement satisfied many, it has never satisfied all. In her reign its maintenance involved a struggle with two sets of opponents. In the earlier part of the reign the struggle was with the old religion allied with feudal lawlessness and foreign intrigue in favour of the captive Mary. The suppression of the rebellion of the Northern earls finally ended the long war with baronial turbulence.[3] The papal excommunication of the Queen, the mission of the Jesuits, and the assassination plots which ensued, were met by the admirable precautions of Burghley and Walsingham, and punished by stringent penal statutes;[4] and these dangers had so strongly impressed the popular imagination that they gave rise to a national fear and hatred of all Roman Catholics, and more especially of the Jesuits, which continued for several centuries to be a striking national characteristic. In the latter part of the reign the struggle was with Calvinistic Puritans, who desired to see a church, purged of the superstitious observances which the English church still retained, but possessed of an

[1] See Maitland, Camb. Mod. Hist. ii 598.

[2] Vol. i 591, 596; above 45.

[3] The character of this rising is marked by the same characteristics as marked the Pilgrimage of Grace; for a detailed account of it see R.H.S. Tr. (N.S.) xx 171-203.

[4] Below 495-496.

independence of the state which was more Roman than any of the rites and ceremonies which they condemned as popish.[1] Their agitation was generally conducted in Parliament; and they formed the first real Parliamentary opposition which a Tudor sovereign had ever been called to face. In that opposition we can see the germs of a division in the nation which will eventually give rise to two great political parties in the English state. Moreover, there is at least one instance in which a group of these sectaries, who had been banished from the realm, departed to Canada;[2] and in their action we can see the beginning of a movement which in later days gave birth to some of the most famous of the English Colonies.

The same modern note characterizes the economic and social policy of the reign. The coinage was reformed;[3] and this was the beginning of a new economic policy which, by gradually improving the trade of the country, solved in a manner which was destined to be very permanent many of the social difficulties of the earlier years of the century. Burghley deliberately set himself to foster national power through state action.[4] New inventions and manufactures were encouraged.[5] Companies to exploit foreign trade were promoted.[6] Expeditions started out to plant colonies; and, in the early years of the seventeenth century, the success of these expeditions is seen in the royal charters which encouraged new settlements and provided them with the machinery of government.[7] The relations between employer and employed were carefully regulated.[8] The growing of corn was encouraged, and so successfully that men began to find that its cultivation paid them as well as those extensive sheep farms against which the legislature had been struggling for the greater part of this century.[9] The supply and price of corn and other provisions were minutely supervised.[10] Above all, the greatest attention was paid to the navy, and to all problems connected with shipping, whether relating to the supply of men or the supply of material.[11] The religious wars in the Netherlands helped forward this economic policy. Protestant refugees were encouraged to bring their arts

[1] Above 20 n. 2. From this point of view writers of the seventeenth century identify the doctrines of Papists and Calvinists, Figgis, Divine Right of Kings 277-279.

[2] Dasent xxviii 153 (1597), "Order was taken for the banyshment of certaine Brownistes out of the realme intending a voyage to the Bay of Canyda."

[3] Cunningham, History of Industry and Commerce ii Pt. I. 127-136.

[4] Ibid 53-84.

[5] Below 343-354.

[6] Below 320-321.

[7] Below 338-340; the first charter of Virginia was granted in 1606, and the charter of Maryland in 1632.

[8] Below 379 387.

[9] Above 24; below 368.

[10] Below 373-379.

[11] Cunningham, op. cit. ii Pt. I. 63-75.

and crafts to England;[1] and, after the fall of Antwerp, there were signs that London might some day become the commercial capital of Europe.[2] The problem of pauperism and unemployment, which had been a pressing problem all through the Tudor Period, was in a large measure solved, partly by the growing prosperity of the country, partly by a comprehensive statute which is the basis of our modern Poor Law.[3] In all these various spheres we find the beginnings of an economic and a social policy which has lasted for many centuries.

On all sides of the national life the thirty years of the Elizabethan peace are the dividing line between mediæval and modern. Their result was a united English nation brilliantly started on its modern career. At home peace and prosperity, abroad victory over the dreaded power of Spain, and visions of new English nations beyond the Atlantic, fostered a patriotic pride and an abounding self-confidence. As a consequence we get that wonderful outburst of literary activity which makes the age of Elizabeth the true period of the English Renaissance and the golden age of English literature. Whether we look at the works of translators like North, who gave to their countrymen the works of classical antiquity translated into the words and atmosphere of Elizabeth's days; or at the works of Hakluyt, who has preserved the acts and words and thoughts of the men who made England the mistress of the seas; or at the works of chroniclers like Camden, or poets like Spenser or Sidney, or dramatists like Marlowe or Shakespeare—we see a youthful nation, just realizing its powers, rejoicing in its strength, proud of its past, and full of hope for its future. In literary history, as in the history of other departments of national life, what was begun under Henry VIII., and continued under Edward VI., came to maturity under Elizabeth. But with the history of literature we are here only concerned in so far as it illustrates the triumph of the new ideas introduced by the Renaissance and the Reformation; and for this purpose we must look chiefly at the works of Francis Bacon. In them we can see the most decisive break with the mediæval ideas, and the most complete acceptance of modern modes of thought. In them we can see how far England had travelled during the Tudor period. With the man himself we shall make closer acquaintance in his capacity of lawyer and statesman; but, following his own precept "not to intermingle matter of action with matter of

[1] Early in the seventeenth century the privileges they had got sometimes gave rise to disputes with English traders; in 1613-1614 difficulties had arisen between Dutch settlements in Canterbury and Norwich, Acts of the Privy Council (1613-1614) 8, 10-11, 355-362.

[2] Cunningham, op. cit. ii Pt. I. 148.

[3] Below 397.

general learning,"[1] I shall glance here at that nobler side of his intellect which impelled him to serve mankind by endeavouring to extend the kingdom of man over the universe.

The root idea of Bacon's philosophy was the belief that this extension of the kingdom of man could only be effected by ascertaining and obeying the laws of nature. In putting this idea before the world he developed an aspect of the New Learning which, amid the admiration for the literature of classical antiquity and the war of creeds, had hitherto been comparatively neglected. Some, it is true, had seen that a real knowledge of nature could only be ascertained by a study of the phenomena of nature. Leonardo da Vinci is a conspicuous example;[2] and when Bacon wrote great results had already been achieved by men who had pursued this method of enquiry. Copernicus (1472-1543), Tycho Brahe (1560-1601), Napier (1550-1615), Galileo (1564-1642), Gilbert (1540-1603) are conspicuous examples.[3] But their researches were necessarily partial and fragmentary. The men themselves were little regarded in the learned world of scholarship, and their works seemed of small practical importance compared with theological treatises on the burning questions of the day.[4] Bacon aroused the attention of the world to the importance of a systematic knowledge of all the phenomena of nature, and he also clearly showed that, "the intelligent, patient, persevering cross-examination of things, and the thoughts about them, was the only and was the successful road to know."[5] He called upon men to abandon unverified hypotheses and ingenious speculation, and to turn to the examination of the volume of God's works—the great and common world, "to linger and meditate therein, and with minds washed clean from opinions to study it in purity and integrity."[6] It may be true that the actual methods by which he

[1] Advancement of Learning, Works iii 476.

[2] E. A. Abbott, Francis Bacon 335, says that he anticipated Bacon in his remarks on experiment; he cites Leonardo as saying, "the interpreter of the artifices of Nature is Experience, who is never deceived. We must begin from experiment and try to discover the reason;" cf. Nov. Org. I. LVI., "Veritas a lumine naturæ et experimentiæ quod aeternum est petenda est."

[3] See Abbott, op. cit. 334-339 for some account of these early fathers of modern science.

[4] Servetus is a conspicuous example; he made an important contribution to our knowledge of the circulation of the blood, and yet, says Professor Osler (Servetus p. 24), "So little did he think of the discovery, of so trifling importance did it appear in comparison with the great task of restoring Christianity, that he used it simply as an illustration, when discussing the nature of the Holy Spirit, in his work on *Christianismi Restitutio.*"

[5] R. W. Church, Bacon 252, 253.

[6] Advancement of Learning, Works iii 292; Historia Naturalis Pref. Works v 133, "If therefore, there be any humility towards the Creator, any reverence for or disposition to magnify His works, any charity for man and anxiety to relieve his sorrows and necessities, any love of truth in nature, any hatred of darkness, any desire for the purification of the understanding, we must entreat men again and

proposed to investigate nature were not, and never have been, the methods of those who have made great scientific discoveries; it may be true that, as Harvey said, he wrote about philosophy like a Lord Chancellor; but it meant everything to the cause of natural science that a Lord Chancellor, and a literary genius of the first rank, should throw a glamour round its study by proclaiming to the world the infinite possibilities which it contained of future extensions of human knowledge.[1] It meant everything to the cause of advance in all branches of knowledge that men should be trained to understand "the real subtlety of things."[2] and made to believe that Truth was the child, not of authority, but of Time.[3]

In order to advocate his views as to the manner which learning could be advanced Bacon had been obliged, as he had said, to take all knowledge as his province. He could therefore appraise the defects both of the Old and of the New Learning—both of the schoolmen and of the Renaissance scholars. Of the schoolmen I have already said something.[4] As Bacon puts it, "they did out of no great quantity of matter, and infinite agitation of wit, spin unto us those laborious webs of learning . . . admirable for the fineness of thread and work, but of no substance or profit."[5] The Renaissance scholars had, as we have seen, done good service by the manner in which they had used the works of classical antiquity to emancipate the human intellect from its bondage to the mediæval scheme of knowledge; but they tended "to hunt more after words than matter, and more after choiceness of phrase than worth of subject."[6] Literæ humaniores, Bacon saw, were a part only of knowledge. If studied by themselves and for their own sake only, they led nowhere. It was only from a study of nature at first hand that fruitful advance in learning could be expected.[7] This study of nature at first hand was Bacon's Novum Instrumentum; and it was the logical outcome

again to discard, or at least set apart for a while, those volatile and preposterous philosophies which have preferred theses to hypotheses, led experience captive, and triumphed over the works of God; and to approach with humility and veneration to unroll the volume of Creation, to linger and meditate therein, and with minds washed clean from opinions to study it in purity and integrity," cited R. W. Church, op. cit. 263.

[1] E. A. Abbott, op. cit. 412-414.

[2] Redargutio Philosophiarum, Works iii 583.

[3] Nov. Org. Bk. I. LXXXIV. "Veritas temporis filia dicitur non auctoritatis;" cf. Advancement of Learning, Works iii 291, "*Antiquitas sæculi juventus mundi.* These times are the ancient times, when the world is ancient, and not those which we account ancient *ordine retrogrado*, by a computation backward from ourselves."

[4] Above 11, 15, 29-30; vol. ii 128-132.

[5] Advancement of Learning, Works iii 285.

[6] Ibid 283.

[7] Redargutio Philosophiarum, Works iii 583-585.

of that other Novum Instrumentum—the opportunity to study the New Testament at first hand—which, earlier in the century, Erasmus had given to the nations of Europe.[1] Erasmus had asserted man's right to enquire into the real meaning of the Bible; and that enquiry had led to the repudiation by half Europe of the particular set of theological premises which was at once the basis and the prison of all mediæval speculation. But when once the right to enquire has been conceded, can any bounds be set to it? Bacon could find no subject, "under the mysteries of the Deity," into which enquiry was prohibited.[2] Rather it was man's duty to enquire into the mysteries of nature, "and to spare no pains to search and unravel the interpretation thereof, but pursue it strenuously and persevere even unto death."[3]

Many battles remained to be fought with many creeds before the student of nature conquered the right to state freely the conclusions to which he was led by the study of nature. But the main position had been won when the allied movements of Renaissance and Reformation broke the authority of one infallible church. Man's intellect had freed itself from the fetters which confined it all through the Middle Ages; and though it might for a space be necessary, in the interests of peaceable and orderly government, to subject it to the dogmas of new creeds, its ultimate sovereignty was assured. Already when Bacon wrote theology was no longer the despotic mistress of the other sciences. It had become rather a constitutional monarch; and the day was coming when it would be merely an equal, with perhaps a merely honorary precedence, conferred out of respect for its ancient position.

Henry VIII. had laid the foundations of the modern English state. The structure was completed in the reign of Elizabeth upon the foundations which her father had laid. The achievements of her reign are due in great part to the hard detailed work of the devoted band of able ministers which she gathered round her. But the national instinct was not at fault when it assigned the largest share of the credit to the queen herself. Like her father she could see straight to the heart of a problem, she could choose and trust able men, she could both impress the popular imagination and secure and hold the devotion of her ministers. From her mother she inherited that taste for flattery, flirtation, and favourites which was sometimes the

[1] Above 30.

[2] Filium Labyrinthi, Works iii 500, "Neither could he find in any Scripture, that the enquiry and science of man in anything, under the mysteries of the Deity, is determined and restrained, but contrariwise allowed and provoked."

[3] Historia Naturalis Pref. Works v 133.

despair of her ministers. But her keen sense of the greatness of her position, her desire to retain the affection of her people, her cool judgment and power of self-control, prevented her from making an irretrievable mistake.[1] The one man for whom she felt a real affection was the showy and worthless Leicester—a member of that family of Dudley which had exercised an evil influence upon the policy of her grandfather and her brother. And even where he was concerned she never allowed her heart to rule her head. "There will never Queen sit in my seat," she told her last Parliament, "with more zeal to my country, care to my subjects, and that will sooner with willingness yield and venture her life for your good and safety than myself. And though you have had and may have many Princes more mighty and wise sitting in this seat, yet you never had or shall have any that will be more careful and loving."[2] "Far above all earthly treasure I esteem my people's love."[3] She spoke the simple truth, as all her people knew; and this was the secret of her power.

Like all the Tudor sovereigns, Elizabeth had lofty notions as to the sphere of her prerogative;[4] and her government was often arbitrary. But all thinking men knew that the prerogative as wielded by her had saved the independence of the state, and had asserted the supremacy of the law;[5] and we, looking at her reign from the point of view of later history, can see that it had fitted her people to exercise a larger control over the government. Already at the end of her reign they were beginning to demand to exercise this control. But she was as skilful as her father in the management of Parliament; and her tact and personality enabled her to evade the discussion of those large ecclesiastical and constitutional questions which were beginning to be raised. The seventeenth century was soon to show that it was only a monarch with the Tudor understanding of the English people and genius for diplomacy, who was capable of working a machine so delicately adjusted as the complex system of government which the Tudors had bequeathed to their successors.

It was, as we shall see, a complex system—more complex than the systems of government which were growing up in many continental states; for though there are many analogies between

[1] It was the absence of these qualities that was fatal to her rival, Mary Queen of Scots; as Mr. Law says, Camb. Mod. Hist. iii 293, "Her interests and ideals were those of the Guises. Her heart was not in her own country, but elsewhere; and the main object of her ambition, the Crown of her neighbour."

[2] D'Ewes Journal 660.

[3] Ibid 559.

[4] Below 88-90.

[5] Prothero, Constitutional Documents xviii-xx.

England and the continent in the manner in which the Renaissance and the Reformation had affected the development of the state, there are also many contrasts. In England as abroad the classical Renaissance had loosened the chains in which the scholastic philosophy had bound all knowledge, and had thus enabled new intellectual developments to be made in many directions. In England as abroad the Reformation had, in spite of the disorders with which it was generally accompanied, helped forward the growth of the modern state; and the growth of the modern state had completed the intellectual revolution by subordinating church to state, and thus weakening the uncontrolled authority which theological dogma had formerly exercised. But England, unlike most of the other European states, had seen this great transformation accomplished with the minimum of violent change. Mediæval and modern institutions, mediæval and modern legal and political ideas had been allowed to remain side by side in ill-assorted companionship. Continuity of development was secured; but at the price of complexity of organization and obscurity in the law.

But with these differences between the institutions and the law of England and the institutions and law of other continental countries I must deal in some more detail in the two succeeding sections. And in the first place I must say something of those new institutions upon which the structure of the modern state was based.

II

The New Institutions—the Rise of the Modern State

Throughout Western Europe the character of the constitutional changes of the sixteenth century was in one respect the same. A strong centralized government under a more or less absolute ruler was substituted for the loosely knit monarchies of the Middle Ages.[1] In England, as we have seen, the Tudors established such a government by means of a reorganization of the

[1] Ranke, Turkish and Spanish Monarchies (Kelly's tr.) 55, puts the nature of the change very clearly: "The matter may be put in general thus. Whereas the old constitution was based on individual and corporate communities, which sought carefully to repel every incursion of the central power; whereas this central power was more acted on than active, and even by the natural course of things grew weaker from epoch to epoch; whereas finally the constitution was not shut in within itself, but saw its clergy dependent on a foreign supreme head, and its nobility and its citizen classes so much at variance that each class clung more closely to its coequals in other countries than to its fellow subjects at home; . . . in the succeeding times the central authority restricted or overthrew the liberties that opposed it, hedged in the state more closely, and raised itself to intrinsic strength and power;" cf. Figgis, From Gerson to Grotius, 52.

Council and a large extension of its power. Abroad somewhat similar results were achieved by the adoption of somewhat similar measures. But though there is necessarily some resemblance between the constitutional changes which were creating the modern state both in England and on the continent, it is the differences between English and the continental development which are the most striking. Consequently we shall see that the English state, when it emerged from the sixteenth century, had acquired characteristics which caused it to differ from contemporary continental states far more essentially than it differed from them in the Middle Ages. No doubt in the Middle Ages the differences between the law and government of England and the law and government of continental states were marked. But it is during this century that these differences were both widened and deepened. The modern territorial state was being created; and its rise, by accentuating old and introducing new differences, tended to foster the growth of those many divergencies of law and government, and of intellectual and religious outlook, which intensified or created the distinct national characteristics of the states of modern Europe. It is clear therefore that if we would understand the changes of a period which, though they resembled the changes which were taking place on the continent, yet resulted in the creation of a state differing essentially from the continental states, we must look abroad as well as at home. We must look not only at the changes which were taking place in England, but also at the analogous continental changes, if, in this century, we would understand the strength and weakness of the Tudor constitution, and if, in the following century, we would understand the whole significance of the controversy between the supporters of Prerogative and the supporters of Parliamentary government.

Though many different countries felt the influence of these changes in this and the following century, France is the country from which their character can be illustrated most clearly. The development of the machinery and theory of government in France was in many respects typical; and just as the English constitution has been a model to many countries in the nineteenth century,[1] the French institutions of the sixteenth and seventeenth centuries were in those centuries a model to many European States.[2] It is for this reason that the contemporary continental

[1] Redlich and Hirst, Local Government, i Pref. xii.

[2] The civil and military organization of the Spanish monarchy under Charles V. and Philip II. resembled that of France in its broad outlines; in both countries the powers of the state were centred in the king, who ruled through various branches of the royal council, Ranke, Turkish and Spanish Monarchies, 38-40, 56-65; in 1661 Frederick III. of Denmark reorganized the constitution of his country upon the French model, Camb. Mod. Hist. v 558-560; and later in the same century Charles XI.

changes can be illustrated most clearly from the legal and constitutional history of France.

In dealing with this subject the following arrangement will be adopted: I shall describe, firstly, the new machinery of central government; secondly, the relation of the new to the old machinery of government; and thirdly, the new position of the king and the new theory of the state. Under each of these heads I shall first of all say something of the continental changes and developments, and shall then describe the analogous or contrasted changes and developments in this country.

The New Machinery of Central Government

The chief feature of this new machinery was a large increase in the powers of the king's Council. Its powers—legislative, administrative, and judicial—were extended at the expense of the powers of older assemblies, courts, and officials; and consequently new departments of government were developed from the Council, and new ministers of state were created.

De Tocqueville has described in a few words the salient features of the government by king and Council which prevailed in France from the last half of the seventeenth century to the Revolution.[1] Though we cannot apply his description without important modifications to the sixteenth century, it is useful to quote it, because it shows us the direction in which the changes made in that century were tending. "At the centre of the kingdom," he says, "and around the throne is an administrative body of remarkable strength, which, in a new manner, combines within itself all the powers of government. This body is the king's Council. Its origin is ancient, but the greater part of its function is modern. It is everything at once: a supreme court of justice, for it can quash the decisions of all the ordinary courts; and a superior administrative court—it is to it that all special jurisdictions have recourse in the last resort. Moreover, as a governmental council it possesses, subject to the royal pleasure, the legislative power. It discusses and proposes the greater part of the laws, it fixes and apportions the taxes. As a superior administrative council it is its duty to lay down general rules to direct the agents of the government. It decides all matters of first-rate importance, and supervises matters of second-rate importance. Everything is concentrated upon it, and from it emanate the activities which affect everything. Nevertheless it

effected similar reforms in Sweden, ibid v 573-575; similarly Frederick William—the Great Elector of Brandenburg—by a series of similar reforms in Brandenburg Prussia, began the work which was completed by Frederick the Great, ibid 642, 643 cf. Sorel, op. cit. i 122-126.

[1] L'Ancien Régime et La Révolution 51, 52.

has no inherent jurisdiction. The king alone decides, though the Council appears to pronounce judgment. Though apparently administering justice, it is composed simply of advisers, as the Parlement pointed out in one of its remonstrances. The Council is not composed of great lords, but of persons of middle or lower class, of former intendants and others thoroughly conversant with business—all subject to dismissal at will."

Already in the sixteenth century the Council was the most important organ of the state.[1] Its members were not only the great officers of the state and paid professional councillors, but also the great nobility and the princes of the blood, and a certain number of titular councillors (*conseillers a brevet*) whose advice was occasionally asked.[2] The Masters of Requests—originally clerks who helped the king to answer petitions—assisted the Parlement[3] and the Council in its judicial work.[4] It was not till the latter part of the seventeenth century that the Council came to consist wholly of professional members.[5] But in the sixteenth century the older feudal officials were fast giving place to newer officials who held office during the king's pleasure.[6] One of the most important of the older officials was the Chancellor. Because he was irremovable many of his functions were, in 1551, transferred with his seal to a guardian of the seals.[7] Of the other officials the most important were the superintendent of the finances, and the secretaries of state.[8] The latter were "les véritables ancêtres des ministres modernes;"[9] and we shall see that in this respect the English development was very similar.[10] In the sixteenth century the Council had begun to divide itself into several committees for its several functions. By the end of the century we can see a Council of State, a Council of the Finances, and a Council for judicial business.[11]

[1] Esmein, Histoire du Droit Français (11 Ed.) 523; Brissaud, Histoire du Droit Français 819, "Les attributions de ce corps sont des plus vagues: gouvernement, administration, contentieux administratif, justice, il touche a tout."

[2] Esmein, Histoire du Droit Français 520-522; the last class were persons, "qui avaient reçu le titre, le *brevet* de conseillier du roi leur conférant le droit de prendre au conseil séance et voix deliberative, mais qui, en réalité, ne siegaient pas le plus souvent;" this *brevet* was given somewhat freely.

[3] For the Parlement of Paris and other Parlements see below 170-172.

[4] Esmein, op. cit. 522, 532; cf. vol. i 412-416 for the English Masters of Requests and Court of Requests.

[5] Esmein, op. cit. 528. [6] Ibid 495 seqq.

[7] Ibid 502, "Le roi ne pouvait destituer le chancelier; mais on admit qu'il pouvait lui enlever sa prérogative la plus importante, celle qui faisait sa force, c'est a dire la garde et la disposition du sceau de France;" Brissaud, Histoire du Droit Français 830.

[8] Ibid 831-833.

[9] Esmein, op. cit. (5 Ed.) 448. [10] Below 66-67.

[11] Esmein, op. cit. (5 Ed.) 526; Brissaud, op. cit. 822-824; cf. Ranke, op. cit. 38-40 for similar developments in the Spanish monarchy under Charles V. and Philip II.; see below 59 n. 5 for the seventeenth century organization in France.

The conduct both of domestic and foreign affairs was in the hands of the Council. It was gradually increasing its control over the local government.[1] It could tax,[2] and in it were prepared the most of the laws enacted by the king.[3] It had an extensive jurisdiction; for the king, by delegating the right to exercise judicial functions, had not deprived himself of the power to resume them.[4] Not only had it exclusive jurisdiction over all administrative questions,[5] it had also the power to interfere in various ways with the ordinary course of justice—by withdrawing a case from the ordinary courts, by directing the mode in which and the court before which it should be heard, by quashing a decision, by appointing a special commission of named persons to try a case.[6] It is to these extensive judicial powers of the Council that we must look for the origin of the continental system of administrative law.[7]

In France, as in England, many different royal courts had come into being in the Middle Ages. Just as in England we have the Exchequer, King's Bench, Common Pleas, and the Council; so in France we have a Chambre des Comptes, a Cour des Aides, Parlements, and a Grand Conseil.[8] But the jurisdictions of all these French courts were, in the course of the sixteenth century, being overshadowed by the growing jurisdiction of the Conseil du Roi. It claimed cognisance of all manner of cases in which the government was interested, and assumed power to withdraw cases when it pleased from the ordinary courts.[9] It was the necessity of securing a court

[1] Below 109-110.

[2] Below 167, 169 n. 1.

[3] Brissaud, op. cit. 376, 795, 796, 823; below 167.

[4] Esmein, op. cit. 485, "On disait que le roi, en déleguant l'exercice de la justice, n'en avait point aliéné la propriété; il l'avait retenue, au contraire, et pouvait l'exercer lui même, quand bon lui semblait."

[5] Ibid 527.

[6] Ibid 485-494—the chief methods were evocation, jugements par commissaires, committimus (a privilege given to certain persons only to be sued before a specified court), cassation, réglements de juges (conflicts between different jurisdictions), lettres de justice (instructions as to the hearing of a case).

[7] Though it is generally true to say that the principal states of the continent are distinguished from the British Empire and the United States by the presence of a system of administrative law, we should remember that there are variations in the relations of this administrative law to the ordinary law, and the ordinary courts. From this point of view Laferrière, Traité de la Jurisdiction Administrative i 26, 27, points out that these states fall into two classes: in the first class are those states which recognize the chief features of the French system—separation of powers, administrative tribunals, conflits. In the second class are those states which keep administrative functions separate from judicial functions, but which have no separate administrative courts; the ordinary courts decide all cases, but they cannot actively interfere with the administration, or annul their acts—" L'indépendance de la fonction administrative a l'égard des tribuneaux peut, au besoin, être revendiquée au moyen du conflit."

[8] Laferrière, op. cit. 139-149.

[9] Ibid 151, 152. Between 1592 and 1610 it gave 16,653 decisions—" On y trouve toutes les decisions qui correspondaient à l'exercice de l'autorité royale en matière

devoted to the interests of the government that goes far to account for its encroachments upon the sphere of the ordinary courts. The ordinary courts were the old established courts; and over them the control of the government was limited, because they were staffed by judges who, having bought or inherited their offices, were irremovable. For this reason their jurisdiction was gradually superseded in all cases in which the government was interested by the jurisdiction of a tribunal which was staffed by royal officials who held their offices at the pleasure of the king;[1] and this process was rendered the easier by the disputes of these courts with one another.[2]

The growing power of the Conseil du Roi did not pass wholly unchallenged. At the end of the sixteenth and the beginning of the seventeenth centuries keen conflicts of jurisdiction arose, not unlike the contemporary English conflicts between the common law courts on the one side, and the Chancery, the court of Requests, and the Council of Wales on the other. In the seventeenth century both in France and in England these conflicts took upon themselves a political aspect.[3] In the wars of the Fronde the nobility and the Parlements stood together against the growing power of the Conseil du Roi, and its agents (the intendants) in the provinces. But the issue of the struggle in the two countries was very different. In England the victory remained with the Parliament and the courts of common law, and the jurisdiction of the Council in England was abolished. In France the king triumphed finally in 1661.[4] The jurisdiction of the Conseil du Roi and that of its agents were consolidated in a system of administrative courts and administrative law which grew and increased at the expense of the ordinary courts and the ordinary law.[5]

de réglements de tutelle administrative, de finances, de juridiction contentieux ou gracieux, et même de juridiction pénale appliquée le plus souvent à des faits de malversation ou de rebellion. On y remarque aussi un grand nombre d'arrêts d'evocation retirant aux parlements ou aux Cours des Aides la connaissance d'affaires intéréssant des agents de l'authorité royale ou du fisc, des fermiers de gabelles, des collecteurs de taille, etc."

[1] Laferrière, op. cit. 144, 146, 150; Esmein, op. cit. 471-494; De Tocqueville, Ancien Régime et la Révolution 87, says, "Il n'y avait pas de pays en Europe ou les tribunaux ordinaires dépendissent moins du gouvernement qu'en France; mais il n'y en avait guère non plus ou les tribunaux exceptionnels fussent plus en usage."

[2] E.g. between the Parlement of Paris and the Grand Conseil, Laferrière, op. cit. 150; and cf. the next note.

[3] Laferrière, op. cit. 154, 155, "Avant le régne de Louis XIII. les parlements avaient eu souvent des demêlés, soit avec la Chambre des Comptes, le Grand Conseil, les cours des aides, soit avec les commissaires départis, et le Conseil du roi lui même. Mais ces conflits n'avaient été le plus souvent que des querelles de légistes et des conflits de juridiction; ils devinerent sous Richelieu de véritables conflits politiques."

[4] Ibid 156-161.

[5] Ibid 164-168. In the seventeenth century there were really three sections of the Council which did judicial work of different kinds: (1) Le Conseil des

These results were not attained in the sixteenth century; but it was then that their beginnings appear in the growing control of the council over all departments of the central and local government of the state.

England in the sixteenth century exhibits clearly enough two of the principal features of the continental scheme of government—the growth of the powers of the king and his Council, and the beginnings of a system of administrative law.

At the close of the Middle Ages the functions of government were already to some extent specialized. Parliament had made good its claims to control taxation and legislation.[1] Large parts of the judicial powers of the state were vested in the common law courts; and they, as we have seen, were quite independent of the Council, and sometimes even hostile to it.[2] Other parts of the judicial power were vested in the Admiralty, the Chancery, and the court of Requests; and these courts, though more closely associated with the Council than the courts of common law, became early in the sixteenth century quite distinct bodies.[3]

The Council was thus tending to become primarily an executive and administrative body. But it did not cease to exercise on occasion other powers. Thus it possessed very wide powers of acting judicially whenever it saw fit. It is true that there was a tendency to delegate these judicial powers to the court of Star Chamber.[4] But we have seen that the Council and the court of Star Chamber were practically the same body; and that it was on this identity that the legality of the wide and indefinite powers of the Star Chamber was rightly based.[5] It is true that at the latter part of this period there are signs of increasing separation between these two bodies. We can trace differences in their membership, and in their procedure; and cases were heard publicly before the Star

parties—this heard cases between private persons; (2) Le Conseil des déspêches—this heard all matters relating to the central administration of the kingdom brought before it by a Secretary of State, and it was in direct communication with all the officials of local government; (3) Le Conseil des finances—this did for the fiscal administration what (2) did for general administration; the Conseil d'Etat had come to deal chiefly with foreign affairs, Esmein, op. cit. 529. As De Tocqueville points out, Ancien Régime et la Révolution 78, it became in the last century of the monarchy common form in royal edicts and declarations to exclude the jurisdiction of the ordinary courts.

[1] Vol. ii 429, 435-440, 441; below 99-105, 181-182.

[2] Vol. i 509-510.

[3] Ibid 546-547, 409-410, 412-414.

[4] Ibid 497-502. See Professor Pollard's able paper in E.H.R. xxxvii 516; but I find no warrant in the Act for his conjecture that the Act of 1487 (3 Henry VII. c. 1) was designed to deal primarily with offences by the king's household officials, ibid 526-527; it may be said that officials, such as sheriffs, were the most usual offenders, but these can hardly be called household officials; note that the committee was given a jurisdiction over certain officers created by the abortive bill for the registration of conveyances, below 458 n. 6.

[5] Vol. i 512-513.

Chamber and privately before the Council.[1] But, for all that, the Star Chamber never ceased to be substantially the Council sitting in a judicial capacity. Similarly we shall see that the Council exercised certain legislative[2] and fiscal powers[3]—it issued proclamations and it demanded loans. In fact, at all times, the line between executive and administrative powers on the one side, and judicial legislative and fiscal powers on the other, is hard to draw accurately. Even at the present day a strong executive will often try to usurp some of these other functions of government. Much more was it likely to do so in an age in which the line between these various functions of government was as yet newly and therefore faintly drawn—in an age in which a strong executive was the first essential of good government.

In England, as abroad, the old indefinite powers of the mediæval Council helped the Council in the sixteenth century to exercise the authority needed to reform or replace the old machinery of government, and to create the new machinery needed by the modern state. Thus the Tudor Council and court of Star Chamber have, like the councils and courts of other contemporary kings, a double aspect. If in the wide range and the indefinite character of their powers we see their mediæval origin, in their composition, their organization, and the range of their activities, we see the germs of the governmental machinery of the modern state.

Upon the composition, organization, and activities of the Council the recorded series of its Acts is the chief and the most important first-hand authority. I shall therefore in the first place say something of the history of the form in which the proceedings of the Council have come down to us.

The Council, like the House of Commons, was not technically a court of record;[4] and therefore there is, in the Middle Ages, no official record of its proceedings. "It was under no obligation to record its actions, and did so only so far as the utility of the moment required."[5] Hence the earliest memorials of the Council consist of scattered documents—endorsements upon the petitions presented to it, separate replies to proposals put before it, copies of documents made for administrative purposes, recommendations, ordinances, communications between king and Council.[6] It was only occasionally that the Acts of the Council were formally enrolled either on the Chancery, Close, Patent, or Parliament rolls.[7] The idea of compiling a regular journal of the

[1] Vol. i 499-502. [2] Below 99-104. [3] Below 104-105.
[4] See vol. v 157-161 for the technical meaning of the phrase "court of record."
[5] Baldwin, The King's Council 374.
[6] Ibid 374-384. [7] Ibid 386-387.

Acts of the Council was due to the initiative of the first clerk of the Council—John Prophet.[1] We have in MS. his journal for the years 1392-1393.[2] His intention, says Professor Baldwin, "was not to copy all of the separate notes that were then readily at hand, but to abridge them and summarize the proceedings as they occurred from day to day."[3] His successors did not continue his work; and no similar journal appears till 1421, when the "Book of the Council" begins. In its original form it consisted of several rolls; but these rolls were cut up and pasted into books soon after they had come into the possession of Robert Cotton.[4] "Like the earlier journal it consisted of transcripts and abridgements of as many of the original minutes as were deemed of sufficient importance."[5] It extends to the year 1435. Professor Baldwin thinks that it ceased to be kept in that year; and certainly Fortescue thought that no such book was kept in his day, as he recommends that such a book should be kept.[6] Its cessation is easily explained by the decadence of the Council at the latter part of Henry VI.'s and in Edward IV.'s reigns.[7] The revival of the authority of the Council in Henry VII.'s reign is marked by the beginning of a new register called the "Book of Entries," the original of which has been lost.[8] It was not till 1540 that the record of the Acts of the Council, in a series which is almost continuous,[9] begins. On August 10th of that year a resolution is recorded in these Acts "that there should be a clerk attendant upon the said Council to write, enter, and register all such decrees, determinations, letters, and other such things as he should be appointed to enter in a book, to remain always as a ledger, as well for the discharge of the said counsellors touching such things as they should pass from time to time, as also for a memorial unto them of their own proceedings."[10]

[1] That Nicolas was right in thinking that John Prophet was the first clerk of the Council, Acts of the Privy Council i 17 and n. 2 has been proved by Professor Baldwin, op. cit. 362-365; for the later history of the office see ibid 365-368; Professor Pollard's article in E.H.R. xxxvii 343-351; see vol. i 482, 490.

[2] Baldwin, op. cit. 389. [3] Ibid 389-390. [4] Nicolas v *iii*.

[5] Baldwin, op. cit. 391; it was not used to record regularly the judicial work of the Council, ibid 303; vol. v 161.

[6] Ibid 391-392. [7] Vol. i 485, 490.

[8] Baldwin, op. cit. 437, "fortunately parts of it were copied so that there exists a number of transcripts in incomplete and fragmentary form."

[9] The gaps in the Tudor period are from July 22, 1543-May 10, 1545, Dasent i *viii*; from May 12, 1559-May 25, 1562, ibid vii *vii*; from May, 1562-May, 1567, we have only a "rough assemblage of scraps of records," and from May, 1567-May, 1570, no record at all, ibid vii *viii*; from June, 1582-February, 1585, and from August, 1593-October, 1505, there is no record, ibid xiv *vii*, xxv *vii*; there are some gaps in Charles I.'s reign; but the total number of years omitted does not exceed twenty-two, ibid i *ix*, and these gaps are partially filled by rough notes and transcripts, cf. e.g. ibid ii *ix*, *x*, and xxv *vii* seqq.; for the gaps between 1602 and 1613, see below 63.

[10] Nicolas vii *i*, *ii*; for the separation between 1533 and 1540 of the offices of clerk of the Council and clerk of the Star Chamber, see L.Q.R. xxxix 240-244.

Some of these records of the Council are in print. Nicolas has collected and printed various scattered records from the year 1386, from the Book of the Council (1421-1435), and from the collection of minutes which extend, with some intermissions, from 1435-1446.[1] He has also printed the first 340 pages of the series of Acts which begin in 1540. The remainder of these Acts, down to 1604, have been printed under the editorship of Dasent.[2] A fire at Whitehall on January 12th, 1618, has caused gaps in the Council Registers from January 1st, 1602, to April 30th, 1613. The printing of the Acts of the Privy Council from 1613 is now in progress.

The Acts of the Privy Council do not contain a complete record of all things done by the Privy Council. They contain only such things as the clerk "was appointed to enter."[3] There is no allusion to decisions upon the many grave questions of foreign policy which were constantly arising all through this period. There is no record of debates in the Council, or of the reasons which induced it to come to a decision. The decisions or decrees alone are registered.[4] But, even with these limitations, the Acts of the Council gave us a photographic picture of the activities of the Tudor government in all its various spheres.

I have already said something of the gradual separation between the Council as an administrative body and the Council as a judicial body. We have seen that the Council sitting in the Star Chamber absorbed the greater part of the judicial work of the Council;[5] and I shall have something to say later of the additions made by that court to the fabric of English law.[6] Here I must deal mainly with the executive and administrative work of the Council. As a result of that work the Council, assisted by the court of Star Chamber, gradually erected, upon a mediæval foundation, the first stages of the modern English State. I shall consider in the first place its composition and organization, and in the second place its activities and constitutional position.

[1] Nicolas, Proceedings of the Privy Council vols. i-vi; cf. Baldwin, op. cit. 373; for the collection of minutes between 1435 and 1446 see Nicolas v *vii*; they extend from November 21, 1436-March 22, 1444, with some fragments from July, 1446; perhaps it was intended to copy them into a register, ibid v *ix*.

[2] Acts of the Privy Council vols. i-xxxii.

[3] Dasent xxii *viii* says that, "the State papers of Henry VIII.'s reign now being calendared by the Record Office show that the most important decisions were taken on days when the attendances only of Privy Councillors are given in the Register without any record of the business transacted."

[4] Nicolas vii *xiii*, *xiv* i the register thus differs from the original minutes, which contain divergent opinions.

[5] Vol. i 495-502.

[6] Vol. v 167-214.

Composition and organization.

A change in the composition of the Council was one of the means suggested by Fortescue for freeing the country from the rule of the over-mighty subject;[1] and his suggestion was carried into effect by the Tudors. All through this period the most influential members of the Council were, as a general rule, not the great nobles,[2] but commoners promoted for their ability—conspicuous examples are Morton, Wolsey, More, Cromwell, the Cecils, Sir Thomas Smith, Walsingham. It was to the work of these councillors that the efficiency of the Council was largely due; and, at the beginning of the century, their appointment was naturally denounced by those whose sympathies were with the older order.[3]

The appointment of members was in the absolute discretion of the crown, and their number varied from time to time.[4] Generally it consisted of some thirty persons.[5] They took an oath of office;[6] and, since the early sixteenth century, they had been clearly distinguished from a group of "ordinary" councillors[7] which tends to grow more shadowy as the Privy Council became a more definite body, and as its powers increased.[8] It is possible that these ordinary councillors were in the latter part of the period represented by the Masters of Requests,[9] by judges and others specially summoned, and by other persons who, together with Privy Councillors, were often placed on

[1] Vol. i 484; vol. ii 413-414, 570 571.

[2] Above 26; in Mary's reign, as we might expect, we find more of the representatives of the old nobility in the Council than at any other period in this century, Dasent iv *xxxiii*, *xxxiv*.

[3] See L. and P. ix no. 957 for Henry VIII.'s answer to the rebels in the Pilgrimage of Grace who had complained of the "vile blood" in the Council; above 39.

[4] See Henry's VIII.'s statement in 1536, State Papers ii 508, cited Tanner, Constitutional Documents 215 n. 1; Smith, The Commonwealth of England (Alston's Ed.) Bk. ii c. 3.

[5] The number in 1526 was 20, Tanner op. cit. 220; in 1546-1547 it was 31, Dasent iv *xxxii*; in Mary's reign it was 44, ibid *xxxiv*; in a list given in Edward VI.'s Remains (Burnet, Hist. of the Ref. (Pocock's Ed.) v. 117) the number is 31; James I. in 1603 limited the number to 24, Dasent xxxii, 498.

[6] For this see Prothero, Statutes and Constitutional Documents, 165, 166; Tanner, op. cit. 225.

[7] Baldwin, op. cit. 450-451; Nicolas vii *xvi*, *xix*, *xxi-xxiii*; L. and P. viii no. 225.

[8] In 1546-1547 Dasent ii 7, allusion is made to "others appointed by the Kinges Majestie our late Souveraigne Lord . . . to be of Counsaill with our Souveraigne Lorde that nowe is, for thaide and assistance of the executors and Privey Counsaillours in all cases wherein the same shuld have neade of advise and counsaill;" in 1553, Dasent iv 419, Sir Thomas Pope is sworne of "the Quenes Councell at Large."

[9] Nicholas vii *xxi*, *xxii* thinks that the ordinary councillors at this period chiefly consisted of the Masters of Requests; but they clearly included others, see vol. i 500, and last note; Sir Julius Cæsar vainly endeavoured to proye that the court of Requests was simply a branch of the Privy Council, and that Masters of Requests were therefore Privy Councillors, Select Pleas in the Court of Requests (S.S.) xl.

various commissions, temporary or permanent, which the Privy Council appointed to deal with the business which came before it.[1]

Meetings of the Council were held once or twice a week or oftener.[2] Generally only a part of the members were present. Four was a quorum in Edward VI.'s reign; but no determination could be come to unless six were present.[3] The sovereign, though in theory always present,[4] was often absent; and the division between the Council in London and the Council with the king[5] was well recognized.

The majority of members of the Council were either the heads of the great departments of government, or high officials in the royal court and household. It is not till almost modern times that the line between these two sets of officials has been drawn with any degree of accuracy, for the king's council was part of the king's household;[6] and in the sixteenth century the distinction was only just beginning to appear.[7] Thus the law was represented by the Lord Chancellor or Lord Keeper, by one or both of the chief justices, and sometimes by one of the puisne judges; religion, by one or both of the archbishops, and a varying number of bishops; finance, by the Lord Treasurer and sometimes by the Chancellor of the Exchequer; the navy, by the Lord High Admiral; the rudimentary military organization by the Master of the Horse and the Master of the Ordnance; the royal court and household by such officials as the Treasurer of

[1] Edward VI. in his Remains (Burnet, Hist. of the Ref. v 118) gives a list of 31 members of the Council, and then a list of nine other persons, of whom two were Masters of Requests, who were not of the Council, but were said to be "called into commission;" for these commissions see below 68-70; cp. E.H.R. xxxvii 536-537.

[2] In Edward VI.'s reign there was a sitting of the Council or some part of it every day, Edward VI.'s Remains, Burnet op. cit. v 121-123; the days fixed in 1558 were Monday mornings, Tuesday, Thursday, and Saturday mornings and afternoons, and other days if necessary, Dasent vii 33, 34; cf. ibid 307 (1565), and viii 180, (1573) for slight variations.

[3] Edward VI.'s Remains, Burnet, op. cit. v 122.

[4] Crompton, Jurisdiction of Courts (Ed. 1594) 35, "Roigne mesme est per intendment touts foits present icy in person . . . et coment que la Roigne ne vient la, uncore entant que sa Counsel est la, est intend que la Roigne mesme est la, et ceo que sa Counsell fait icy, est a judge in ley come feazans la Roigne mesme, car ils parlent ove sa bouche, et sont incorporate a luy;" see vol. i 500 and n. 2; and the Judicial Committee in modern times retains the same theory, see Lord Haldane in Cambridge Law Journal no. 2 at pp 144-145.

[5] In Henry VIII.'s reign the Council sat in two divisions, one of which followed the king or sat in the inner Star Chamber, while the other stayed in London and sat in the outer Star Chamber, Nicolas vii *ix*, *xv*; L. and P. xvi no. 157; ibid xxi *ii* no. 34; the same device was adopted in 1553-1554, Dasent iv 398; vol. i 495-496; E.H.R. xxxviii 49-50; Edward VI. Burnet, op. cit. v 119, notes that he intends to sit with the committee of state once a week, "to hear the debating of things of most importance."

[6] E.H.R. xxxvii 340.

[7] Hall, Studies in English Official Historical Documents 44, 45; cf. Anson, The Crown (1st Ed.) 138-141.

the Household, the Comptroller of the Household, the Chamberlain, and the Steward.[1] The new organization of government was sometimes represented by the Presidents of the Councils of the North and of Wales. But its most characteristic representatives were the Secretaries of State, who were always members.[2] In fact, as Dr. Prothero has pointed out,[3] and as continental analogies show,[4] it is the growth of the importance of the office of Secretary of State during the latter part of this century [5] which is the clearest indication of the changed condition of home and foreign politics, and of the new position which, in view of this changed condition, the state was gradually taking up. The older departments of government—the Law, the Church, the Revenue, the Court, the Navy—might be left to the old officials.[6] But their authority was limited by fixed legal rules and by the terms of their appointment. They were therefore unequal to the task of regulating such new activities of the State as diplomacy, foreign trade, the supervision of the local government, the enforcement of religious conformity, colonial enterprise. The necessary regulation of these new functions of the State was effected by the Crown through the Secretary of State. He was in constant and close communication with the Crown,[7] and absolutely dependent on its will.[8] Unlike the old officials, his authority was circumscribed by no formal commission.[9] It was able therefore to expand, with the growth of the activities of the

[1] The lists of attendances printed at the end of each of Dasent's volumes of the Acts of the Privy Council show which officials were normally Privy Councillors.

[2] For a sketch of the history of the office see Nicolas vi *xcviii* seqq.; Tanner, Constitutional Documents 202-204; for its mediæval history see L. B. Dibben, E.H.R. xxv 430 seqq.; there were generally two secretaries at this period, but once in Edward's VI.'s reign there were three.

[3] Statutes and Constitutional Documents xcviii-ci.

[4] Above 57.

[5] The office does not apparently show any signs of its later importance in Henry VIII.'s reign, L. and P. i *xciv*; but its importance is clearly growing; in 1516 Pace, an able diplomat, was made secretary, L. and P. ii *lxxxvi*, in 1528 Gardiner was secretary, and from March or April, 1534, to July, 1536, Thomas Cromwell filled the post; their precedence in Parliament and the Council was fixed by 31 Henry VIII. c. 10; a different precedence was assigned by royal warrant when two secretaries were appointed in 1540, Tanner, op. cit. 206-207; after Henry VIII.'s reign they ceased to be officers of the Household, Anson, The Crown (1st Ed.) 155.

[6] Prothero, op. cit. ci.

[7] The State and Dignity of a Secretary of State's Place by R. Cecil, Earl of Salisbury, Somers' Tracts (Ed. 1809-1815) v 552-554; at p. 553 he says, "As long as any matter of weight soever is handled only between the Prince and the Secretary, those counsels are compared to the mutual affections of two lovers."

[8] "Suspicion of a Secretary is both a tryal and condemnation, and a judgment," ibid 554; Tanner, op. cit. 211-212.

[9] "All officers and counsellors of princes have a prescribed authority by patent, by custom, or by oath, the secretary only excepted: but to the secretary . . . there is liberty to negotiate at discretion at home and abroad with friends and enemies. . . . Such is the multiplicity of actions and variable notions and intents of foreign princes, and their daily practices in so many parts and places, as secretaries can never have any commission so long and universal as to secure them," Somers' Tracts v 552, 553.

state, into "the great secretarial departments of the present day." Thus both at home and abroad, the rise of his office to importance may be said to mark "the beginning of government in the modern sense."[1]

Just as the officials who were members of the Council indicate the beginnings of some of the great executive departments of the modern state; so the manner in which the Council was organized for the conduct of its business indicates the possibility of future changes within the Council itself, which will tend in the first place to a further elaboration of the machinery of government, and in the second place to new developments in the law.

(1) The size of the Council prevented its meetings from being in any way like those of a modern Cabinet. Rather it was a "standing Board before which came all such matters as now concern the Home Office, the War Office, the Board of Admiralty, the Board of Trade, the Local Government Board, and all the separate Departments by which the Government of the country is administered at the present time."[2] A division into committees thus became necessary for the proper conduct of its business. The number and the functions of these committees necessarily varied from time to time according to the exigencies of its business. In 1526 there was a strong committee to deal with legal business.[3] In 1553-4,[4] separate committees were appointed for the following purposes:—to call in debts and provide for money; to supply the wants of the garrisons at Calais, Berwick, Ireland, Portsmouth, the Isle of Wight, and the Channel Isles; for the navy; for the victualling of Calais, Berwick, etc.; "to consider what laws shall be established in this Parliament, and to name men that shall make the bookes thereof;" to appoint men to examine prisoners; to consider what lands shall be sold, and who shall be the commissioners; to moderate excessive charges; to consider the methods of paying annuities; to appoint a Council to attend and remain at London; to give orders for the furniture and victualling of the Tower. We should naturally expect to find among these committees a committee of the more important councillors whose duty it was to settle the main lines of the policy to be pursued. But of such a committee there is no trace in the Acts of the Privy Council. Except during the reign of Edward VI., this was essentially a

[1] Prothero, op. cit. c, ci; cf. also the account of the duties of a Secretary of State, dated April 26, 1600, and probably by Dr. John Herbert, printed ibid 166-168.

[2] Dasent xxii *viii*. [3] L. and P. iv *iii*, App. no. 67.

[4] Dasent iv 397-399; for another arrangement of committees in Edward VI.'s reign see Edward VI.'s Remains, Burnet, op. cit. v 117-120; this document is entitled, "A method for the proceedings in the council written with king Edward's hand;" see Dasent vii 27, 28 (1558) for another arrangement at the beginning of Elizabeth's reign.

matter for the Crown to decide, with or without the advice of the Council, as it saw fit.[1] It is only in his reign that we find a committee for the state.[2] We can hardly identify this single instance of the appointment of such a committee with those seventeenth century committees, called sometimes committees for the state, sometimes juntos, or cabals, or cabinets, which are one of the roots of the modern Cabinet.[3] On the other hand, we can recognize in some of these other committees of the Council the germs of some of those Boards[4] through which, from the seventeenth century onwards, much of the executive business of the state will be conducted.

(2) Besides these committees of the Council we find many different commissions appointed by it to perform certain defined pieces of administrative or judicial work. Their members were not necessarily privy councillors. They were composed of such officials and private persons as were likely to be conversant with the business which they were appointed to perform. Some of these commissions were of a general and permanent character. Such were the commissions for causes of assurances,[5] for the compounding of debts of prisoners,[6] for the examination of felons.[7] Others were of a more special and temporary character—such was the commission appointed in 1551 to reform the Canon law.[8] Other instances are a commission of 1564 to enquire into the differences between the University and the town at Cambridge,[9] a commission of 1579 to enquire into the grievances of the Channel Isles,[10] commissions appointed in 1527 and in 1528 to enquire into the supply of corn in certain counties,[11] and in 1573 to regulate the supply of provisions in certain counties.[12] In fact, some of these special commissions are hardly distinguishable from the frequent references which the Council directs to judges, merchants, justices of the peace, and others, for the settlement of some of the many and various legal, commercial, and administrative problems which

[1] Clearly this was so in Henry VIII.'s reign see L. and P. i *lxxxi*, and Elizabeth always took care to have the final word; as Sir Walter Mildmay said in Davison's case (1587) 1 S.T. 1246, "As for the Council, it is known that no Prince's counsellors are farther made privy to anything than that it pleaseth the prince, and oftentimes that is imparted to one that is concealed from another with great cause;" cf. Smith, Commonwealth of England Bk. II. c 3.

[2] Edward VI.'s Remains, Burnet, op. cit. v 119; only Privy Councillors were on this committee.

[3] For these see Anson, The Crown (1st Ed.) 92, 93, 96.

[4] Ibid 95.

[5] Dasent x 232 (1578).

[6] Ibid x 338-339; cf. xv 99; xviii 109.

[7] Ibid ix 231, 289 (1576); x 215 (1578).

[8] Ibid iii 382 (1551); vol. i 592, 594.

[9] Dasent vii 153.

[10] Ibid xi 200, 335-336, 347.

[11] Select Cases in the Star Chamber (S.S). xxiii-xxiv; L. and P. iv *ii* nos. 3819, 3822.

[12] Dasent viii 147-148. For other instances of special commissions see ibid i 126; xxxii 497; Nicolas vii 116.

aggrieved individuals or classes of individuals were constantly bringing before it.[1]

These commissions and references show us one of the ways in which the state is setting itself to solve the many problems of this new age. Through them it enquires and informs itself—they do the work done to-day by royal commissions. Through them also it provides new machinery for dealing with old problems, or for bringing under the control of the law some new commercial activity or some new abuse which changed social or commercial conditions have rendered possible. Thus in the commissions which regulate the supply of provisions,[2] and in the cases in which justices of the peace and others are directed to put in force the old statutes against forestalling and regrating,[3] we see the Council maintaining and invigorating the mediæval ideas and the mediæval laws affecting internal trade.[4] In the commission for the examination of felons we see that the need for some better preliminary examination of criminals than was afforded by the presentment of a jury was becoming very obvious in an age when criminals often came from abroad, and when juries were fast ceasing to possess any personal knowledge of the men whom they presented as suspected.[5] In the commissions for assurances, and for the compounding of debts of prisoners, and in the frequent references to merchants and others for the purpose of settling the hard cases of those who found themselves in financial straits through no fault of their own,[6] we can see that the existing law was inadequate to deal with the new commercial conditions. We are reminded of those *Quæstiones* or commissions of the Comitia,[7] by means of which the criminal law of Rome was developed. But the activity of these commissions of the Council was not confined to a single branch of the law, nor was it legal development alone which they promoted. They were the outward sign of the beginning of many new developments both of legal doctrine and governmental machinery. Just as in the organization of the Curia Regis of the twelfth century[8] we can see the germs of the political and legal institutions of the Middle

[1] Thus in 1601, Dasent xxxi 252-253 there is a reference to the Chief Justice of the Queen's Bench and the judge of the Admiralty to hear the complaints of the merchants and make some rules as to the trial of cases of assurance; a few instances out of many are ibid vii 172, viii 95, xi 120-121 (directed to judges); xviii 26, xxii 97 (directed to merchants); xiii 252, xiv 91 (directed to justices of the peace); ix 265 (directed to the Merchant Taylors Company); xvii 26 (directed to Lord Morley in a case which concerned his brother); xxii 63 (directed to private persons).

[2] Above 68. [3] Below 377-378. [4] Vol. ii 466-469.

[5] Vol. i 295-296; see below 70 n. 1 for the successful objections raised by the common lawyers as to the legality of this commission.

[6] Vol. v 136-137; Pt. II. c. 4 I. § 6.

[7] Maine, Ancient Law 382-387. [8] Vol. i 41-54.

Ages, so in the organization of the Council of the sixteenth century we can see the germs of the political and legal institutions of the modern state.

In the last half of this century the legality of some of these commissions was called in question by lawyers who saw that the extensive powers given to them were endangering the supremacy of the law and the liberty of the subject.[1] In the following period the common lawyers limited their sphere of action still more rigidly, and, with the victory of the Parliament and the common law, these limitations have become part of our modern constitutional law.[2]

Activities and Constitutional position.

"The prince," says Sir Thomas Smith,[3] "is the life, the head, and the authoritie of all things that be done in the realme of England;" and the Council was the chief agency for carrying out his will. Its business was, it is true, to administer rather than to initiate, and, on all debatable matters, to advise rather than to decide.[4] But all the routine work of government, whether relating to domestic or to foreign affairs, to industry and commerce, or to naval and military organization and equipment, passed through its hands. With many of these activities we are only indirectly concerned; but with its domestic activities we are directly concerned, because they have had a large effect upon the development of English law public and private. The outstanding feature of this part of its work is the minute and careful manner in which it supervised the working of all the organs of government central and local. This involved the most intimate relations with the provincial Councils and the officials responsible for the local government, with the national church, with all parts of the judicial system, and with Parliament. A short survey of

[1] Bacon, Discourse on the Commission of Bridewell, Works vi 509-516; at p. 514 he says, "There was a Commission granted forth in the beginning of the reign of her Majesty that now is . . . for the examination of felons . . . it so fell out that many men of good calling were impeached by the accusations of felons. Some great men, and judges also, entered into the validity of the Commission. It was thought that the Commission was against the law and therefore did the Commissioners give over the Commission as all men know;" cf. Skrogges v. Coleshil (1559) Dyer 175a; below 528-530.

[2] Vol. v 432-433; on the whole subject see a paper by W. Harrison Moore, Columbia Law Rev. xiii 500-523.

[3] Smith, The Commonwealth of England (Alston's Ed.) Bk. ii c. 3.

[4] See e.g. Nicolas vii 13, 14 (1540)—a debate in the Council, and immediately after the councillors go to the king to know his pleasure; L. and P. ii no. 2464 (1516)—the Council meets after the king and Wolsey have talked matters over with Cardinal Sion; ibid no. 4438 (1518)—Sir Thomas More is reported by the Venetian ambassador to have said that "the Cardinal of York most solely transacted this matter with the French ambassadors; and when he has concluded he then tells the councillors, so that the king himself scarcely knows in what state matters are;" Perhaps the ignorance of the king was exaggerated or intentionally mis-stated, see above 34 n. 7.

the nature of its relations with these different bodies will illustrate the extraordinary range of its activities in the field of domestic government, and will enable us to appreciate the commanding position which it occupied in the English Constitution of the sixteenth century.

(i) *The Council and Local Government.*

The establishment of a central executive body, which possessed sufficient authority over the local governing bodies and officials to make its will prevail throughout the body politic, was the characteristic which most fundamentally differentiated the mediæval from the modern state. This meant a change, not only in the form and character of the government, but also in its intensity. In the Middle Ages local government had, as we have seen, been generally carried on by self-governing communities, and by officials whom they appointed.[1] The control exercised by the central government over such communities and officials was intermittent and irregular. Each unit had a large discretion as to the manner in which it should manage its own affairs. If statutes were passed or orders given by the legislature or the executive, they were often very general in their scope; they often provided no machinery for carrying these general principles into effect; and they were never accompanied by any continuous supervision of the bodies or officials who were entrusted with their enforcement.[2] The central government might lay down general principles, but, as an executive, it was inefficient. There was much more executive force in the local governing bodies than in the central governing body. In this century these relations between the local and central government were to a large extent reversed. We have seen that, as the results of the movements of the Renaissance and the Reformation, the territorial state had become in theory supreme.[3] If that supremacy was to be realized the state must adopt a different attitude to the system of local government; and the system of local government must be altered so as to fit in with the new position taken by the state. The central government must not only lay down general principles; it must see that these principles were carried out in detail. It must not only make law; it must see that it was obeyed.

We shall see that in continental states the old system of local government was gradually superseded by an entirely different system. The self-governing communities were either replaced by new officials who were simply the delegates of the central government, or they were brought under the strict control and supervision of the central government.[4] But we shall see that in

[1] Vol. ii 403-404.
[2] Ibid.
[3] Above 18-19.
[4] Below 109-111.

England there was never any sweeping change of this kind.[1] We have seen that as early as the thirteenth century the self-governing communities were being disciplined and controlled by the central authorities, and by the rules of the common law;[2] and that in the fourteenth and fifteenth centuries they were being further controlled, and, with respect to many of their powers, superseded by a new race of royal officials—the justices of the peace.[3] These justices also were controlled by the crown, whose servants and appointees they were, and by the central courts of common law.[4] Three centuries of control by the crown, the courts of common law, and the itinerant justices, had produced a system of local government which was quite capable of being adapted to the needs of the modern state. Though its units still retained much of the mediæval independence and initiative, though it was still a system of self-government, it could be controlled, and, with some changes and additions, used by the modern state.[5] What was most urgently needed was a change in the character of the control exercised by the central government. It must be a constant, a minute, and a regular control which should gradually enforce upon the units of the local government conformity to those newer and higher standards of government demanded by the modern state. This requisite was supplied by the labours of the Tudor Council. Hallam has remarked that Burghley's letters give us the impression that "England was managed as if it had been the household and estate of a nobleman under a strict and prying steward;" and that, "it was a main part of his system to keep alive in the English gentry a persuasion that his eye was upon them."[6] But Burghley did not invent this system. It had been practised with equal thoroughness by Thomas Cromwell;[7] and the records of the Council show that it was a characteristic of the Tudor government during the whole of this century. In fact the tedious and detailed work which it involved was the most important contribution of the Council to the formation of the modern English state.

The control of the Council was exercised in many different ways. Sometimes it took the form of direct general orders,[8]

[1] Below 163-165.

[2] Vol. i 72-75, 80, 87-89; vol. ii 396-400.

[3] Vol. i 286-288; below 134-137.

[4] Vol. i 297-298; Miss B. H. Putman, Enforcement of the Statutes of Labourers 92-97 has shown that the control exercised by the central courts over the Justices of Labourers was very close, vol. ii 462-463; below 77-80, 85-87.

[5] Below 165.

[6] C.H. i 246, 247.

[7] See in L. and P. vii no. 1669 (1534) an elaborate report on the state of the government of Yorkshire prepared for Cromwell.

[8] Select Cases in the Star Chamber (S.S.) xxiii, xxiv—directions in 1527 as to forestalling, regrating, vagabonds, and unlawful games; ibid xlvi (1533) orders as to the meat trade: L. and P. (1538) xiii pt. 2 no. 1171—directions to the justices as to

sometimes of advice, exhortation, and rebuke, but generally of direct enquiry by itself or its agents into the facts of particular cases of wrong-doing to which its attention had been called by the aggrieved party. The maintenance of this control involved direct relations and constant communication with all the officials and bodies entrusted with the work of local government. A glance at the character of these relations and communications with these various officials and bodies will show us the way in which the Council introduced a wholly new spirit into the local government of the country.

We have seen that in Wales and the Marches, in the north, and for a short period in the west[1] of England, subordinate Councils had been established.[2] They were responsible for the proper working of all the machinery of government, judicial and administrative;[3] and they were expected to carry out the orders

maintaining the royal supremacy, obeying the king's ecclesiastical injunctions, the suppression of seditious rumours, and the correction of vagabonds; cf. ibid xvi no. 945 for a somewhat similar set of directions sent out in 1541; Dasent ii 471 (1547)—as to coast defence; iii 260 (1551)—a circular letter to the justices to put in force the laws as to vagabonds, watches, unlawful games, seditious rumours, and the like; xxiii 220, 221 (1592)—an order addressed to the Mayor of London as to the precautions to be taken to stop the plague; xxx 733-735 (1600)—as to enforcing orders against engrossers and regrators of corn; Hamilton, Quarter Sessions from Elizabeth to Anne 78-80—a set of orders sent out in 1609 as to the enforcement both of statutes and of directions given by the king and Council; in 1595 the Justices who lived near London were ordered to appear at court, and Puckering L.K. addressed them in an oration devised by the Queen, Hawarde, Les Reportes des Cases etc. 19, 20; sometimes these orders were supplemented by the legislature see e.g. 1 James I. c. 31 as to the regulations in time of plague.

[1] For the establishment of this short-lived Council in 1539 see L. and P. xiv *i* no. 743; for its history see Skeel, The Council of the West, R.H.S. Tr. 4th Series iv 62-80; its institution was due partly to the desire to give a local judicature to the West, but chiefly to the fear that the West might, like the North, rebel in consequence of the dissolution of the monasteries; and its instructions were modelled exactly on those of the Council of the North, Skeel, op. cit. 63-67; it acted during 1539 and 1540, ibid 70-72; but its authority seems soon to have been disregarded, L. and P. xv no. 180 (1540); and it may have come to an end about that date, Skeel, op. cit. 73-75; as Miss Skeel says, while the Councils of the North and of Wales were natural growths which had their roots in the past, and their background in the history of the Scottish and Welsh borders, the Council of the West was "an artificial imitative thing, and therefore soon succumbed to local opposition."

[2] Vol. i 502-503. It was difficult to enforce the king's rights strictly in these outlying portions of the kingdom, see L. and P. ii *ii* no. 4547; ibid vii no. 1669; ibid viii no. 513. A very good account of the condition of the government of the North in the Middle Ages, and of the gradual evolution of a Council of the North will be found in Reid, The King's Council in the North Pt. I.

[3] The Vice-Admiral of North Wales wrote to the Earl of Bridgewater, the Lord President of the Council of the Marches, "Nothing within this your jurisdiction of Wales can be strange to your Lordship, for that your Lordship is the true centre where all our lines meet, and what is within the knowledge of any man of quality and understanding will be sure to find a way unto you," cited Skeel, op. cit. 274; in a case of 1595, in which the justices of the peace were charged by the Council of the North with neglecting to regard a writ of supersedeas issued by the Council, much was made of its "supereminent and regal jurisdiction," and its "absolute kingly authority," which gave it power, among other things, to guide inferior magistrates within the bounds of their duties, to call justices of the peace before

of the Privy Council.[1] Thus they could be ordered to hear cases,[2] to rehear them,[3] to stay proceedings,[4] or to examine suspected persons.[5] They helped the Privy Council to collect forced loans,[6] to supervise the due execution by the local authorities of their administrative duties,[7] and to deal with complaints against officials civil[8] or military.[9] They were, as Miss Skeel puts it, "convenient courts of first enquiry, especially in matters where his Majesty's service was specially concerned, or where the ordinary course of the law could not be safely followed."[10] They were liable to admonition or rebuke if they misused their authority, or disobeyed the orders of the Privy Council. Thus in 1565 serious complaints were made against the Council of the North.[11] In 1589[12] and 1598[13] the Privy Council was considering abuses in the procedure of the Council of Wales and Marches. In 1600 the President of the same Council was rebuked for disobedience to orders.[14]

them to render account of the state of their counties and their own doings, and to deal with their offences, J. Lister, West Riding Sessions Rolls, iii-vi, 1-3; for charges given by the Council of the North to the Justices see S.P. Dom. Add. (1564) 550; ibid (1569) 84-85; ibid (1572) 435-436; in 1599 the same Council issued an elaborate series of orders as to the administration of the new Poor Law, Lister op. cit. xxxi-xxxiv

[1] Dasent xxv 429, 430 (1596)—an order to the Council of Wales to see to the erection of a bridge over the Severn.

[2] Nicolas vii 43 (1540); 298 (1542); Dasent iii 464 (1551-1552); vii 156 (1564); xvi 124, 125 (1588); xxii 527, 528 (1592); xxv 211, 212 (1595-1596); xxviii 360 (1597-1598).

[3] Ibid xxviii 466 (1598)—an order to the Council of Wales to re-examine a case was withdrawn.

[4] Ibid xi 55 (1578-1579); xxviii 16, 17 (1597)—a stay of process was withdrawn; ibid 345-346—informations before the Council of Wales which had been used to delay proceedings before the Star Chamber.

[5] Ibid xi 425 (1580).

[6] Ibid i 13 (1542)—thanks to the President of the Council of the North for his dexterity in managing the loan; xxviii 176-177 (1597); cf. Skeel, op. cit. 146, 148, 156 for similar services in the seventeenth century in connection with loans and shipmoney.

[7] This is a prominent feature in the instructions to both councils; for Wales see Skeel, op. cit. 91; for the North see Prothero, Documents 374 (§ 37)—according to this clause (which occurs in earlier instructions, ibid 377 n. 1) the Council was directed to call before them the justices in the shires within their commission, to enquire into the state of the shires, and "to take order for the reformation and amendment of things amiss . . . and if any notable offence shall appear in any of the said justices of peace then the Lord President etc. shall take order by fine or otherwise for reformation thereof or else certify same to our Council in the Star Chamber and take bonds of the offenders for their appearance."

[8] Dasent xxv 211, 212 (1595-1596)—complaint against the mayor of Carmarthen; xxviii 360 (1597-1598)—the bailiffs of Shrewsbury and their right to toll; cf. Skeel, op. cit. 229-232 for more details as to the last-named case.

[9] Dasent vii 358-359 (1570)—a complaint against certain officers for misusing soldiers is ordered to be heard by the Council of the North.

[10] Skeel, op. cit. 148.

[11] Dasent vii 231 (1565); but the complainant was sent to be tried by them; and, further complaints being made of their ill-usage, they were ordered to look carefully into the case, ibid 233, 301.

[12] Ibid xviii 239. [13] Ibid xxviii 551-552. [14] Ibid xxxi 51.

The jurisdiction of these Councils was limited to certain parts of England and Wales. But all over the country the judges of assize and the Lord-Lieutenants acted as the agents and the informants of the Privy Council.

Though the principal duties of the judges of assize were judicial, they did not, either in this or in the following century, entirely lose touch with administrative work.[1] The Privy Council pointed out in 1589 that it belonged to the judges of assize to reform lewd practices which disturbed the common peace and quiet of the country.[2] They were described in 1607 as the Visitors of the kingdom ;[3] and they were expected both to receive directions from the Chancellor and report to him on their return.[4] It was their duty, not only to hear cases referred to them by the Privy Council,[5] but also to keep the justices of the peace up to their administrative duties.[6] In 1581 they were required to warn the justices of the peace for the counties of Northampton and Huntingdon to make an adequate rate to pay for the repairs to a bridge;[7] in 1592 they were instructed to examine into a charge of oppression made by the inhabitants of the parish of Evisham in Oxfordshire against the local justices;[8] in 1598 to admonish the justices to put in force the statutes made in the last Parliament, "concerninge the reliefe of poore people, maymed souldiers, the punishment of vagabonds and roges, and mayntennance of tylladge;"[9] in 1600 to warn the sheriffs not to keep a public table at Assizes and Sessions on account of the waste of money, and hindrance to the administration of justice which had thereby

[1] Vol. i 272-273, 284.

[2] Dasent xviii 242; ibid ix 20 (1575)—they were summoned to court to advise as to the execution of penal statutes; below 76 n. 3; cf. the powers given by the commission of oyer and terminer, vol. i App. XXIII. c.

[3] Hawarde, Les Reportes etc. 327; cf. ibid 187, the Lord Chancellor told the Judges in 1604, "You must examine theise thinges, and make reporte to His Majestie, and especiallye of the Justices of peace, yf any contemptuouslye be absente or neglygente, to be removed with disgrace; and your Circuites you goe not onelye to sett upon Nisi Prius, but you must have especialle care of the peace of the lande, and of the peace of the Churche."

[4] James I. said in 1616, "It was an ancient custom that all the judges both immediately before going to the circuits, and immediately upon their return, repaired to the Lord Chancellor of England, both to receive what directions it should please the king by his mouth to give unto them, and also to give him an account of their labours, who was to acquaint the king therewith," Works 563.

[5] See e.g. Dasent xi 72 (1578-1579); xii 276 (1580); Acts of the Privy Council (1613-1614) 349—a case referred to them to get it ended by arbitration.

[6] S.P. Dom. Eliza. Add. (1598-1601) 519, cclxxvi, 72—18 articles drawn up by Coke as to matters which the constables of hundreds were to present at the assizes; in 1608 the judges were described as, "the Visitors for tooe times in the yeare, not for justice alone, but for the peaceable gouernemente of the countrye put in great trust by his Majestie, and to make an accounte to him which he will expeete from them," Hawarde, Les Reportes etc. 368.

[7] Dasent xiii 77, 78.

[8] Ibid xxii 515, 516.

[9] Ibid xxviii 388; Leonard, Early History of Poor Relief 179.

arisen;[1] and in 1629 to consult with the local officials as to the regulation of the corn trade.[2] Naturally the judges, so encouraged, frequently made orders on their own responsibility, as to the manner in which the local government should be conducted.[3]

The Lord-Lieutenants made their first appearance in Henry VIII.'s reign. They were appointed by the crown to control the military forces of the country.[4] Their existence and military authority were first recognized by a statute of Edward VI.'s reign.[5] Till 1585 they were temporary officers, appointed in times of stress;[6] but by 1585 they were fast becoming permanent officials.[7] Being appointed from among the greater nobility, they were in close touch with the court; and, like other members of the nobility and the large landowners,[8] they were expected to assist the Privy Council by giving it information as to the state of their counties and as to the doings of the justices.[9] The President of the Council of Wales

[1] Dasent xxx 783-785—the Council are informed that, "In theis later yeares sondry Sherives . . . some for ostentacion and some others to make themselves strong amongst the freeholders to sway causes at their will in the country to the overthrow of justice, have put themselves in the tymes of the Assizes or Sessions . . . into excessive and extraordinary expences;" the result is that, "menn of good abillyty and service do shunne that place, and that . . . there is such tyme spent by the Justices of the Peace and the Grand Jury, by meanes of their bancquettinges and excesses, as the service is thereby much hindered."

[2] C. J. Cox, Three Centuries of Derbyshire Annals ii 189.

[3] Hamilton, Quarter Sessions from Elizabeth to Anne 81—orders of 1612 and 1613 as to execution of statutes imposing penalties for not going to church; 82—orders as to the execution of the law as to ale houses, the poor, and rogues; 115—orders of 1627 to apprehend idle and lewd people, and to suppress unnecessary ale houses; cf. Offley Wakeman, Shropshire County Records xii, xiii; Lambard, Office of Constables etc. 49 seqq. for instructions by the judges as to certain points connected with the administration of the Poor Law.

[4] In Cromwell's remembrances for 1539, L. and P. xiv *i* no. 400, we see the idea of having "in every shire a person whom the king can best trust, to whom as much of the shire as the king shall appoint may resort," also lieutenants and leaders for the army—but as yet the two are separate; see Prothero, Documents cxx; Webb, Local Government, The Parish and the County 286, 287; Beard, The Office of Justice of the Peace 112, 113.

[5] 3, 4 Edward VI. c. 5 § 13, "If the king shall by his letters patent make any Lieutenant in any county or counties of this realm for the suppressing of any commotion rebellion or unlawful assembly, that then as well all the Justices of the Peace of any such county and the sherriffs . . . as all mayors bailiffs and other head officers and all inhabitants . . . shall upon declaration of the said letters patent and request made, be bound to give attendance upon the same Lieutenant to suppress any commotion rebellion or unlawful assembly;" cf. 1 Mary st. 2 c. 12; 1 Elizabeth c. 16.

[6] Scott Thomson, Lords-Lieutenants in the 16th Century, chaps. ii and iii; C. J. Cox, Three Centuries of Derbyshire Annals i 21, 22, citing Camden, Elizabeth.

[7] The form of their commission was then fixed, Scott Thomson, op. cit. 59; their assistants had by 1570 acquired the name of Deputy-Lieutenants, ibid 60-72; cf. Cox, op. cit. i 168.

[8] See e.g. L. and P. iv *ii* nos. 4276, 4300, 4301; ibid viii nos. 1014, 1030; ibid xii *i* no. 815.

[9] S.P. Dom. Add. (1547-1565) 495—the Earl of Arundel, when appointed Lord-Lieutenant of Sussex and Surrey, probably in 1559, was instructed to enforce the

and the Marches was usually Lord-Lieutenant of all the counties of Wales;[1] and in England the Lord-Lieutenants were often Privy Councillors, and acted as the agents of the Privy Council in all military matters, in the collection of loans, in the superintendence and appointment of local officials, in the gathering and forwarding information as to state of public opinion in their districts, and as to the manner in which the justices and other officials were fulfilling their duties.[2]

These subordinate Councils, the judges of assize, and the Lord-Lieutenants were as much a part of the machinery of central as of local government. They were therefore more directly the agents of the Privy Council than such purely local authorities of the counties and the boroughs as justices of the peace, sheriffs, and mayors. But over all the local officials the Privy Council kept an equally strict supervision, either directly[3] or through its more immediate agents. It was always ready to investigate complaints of negligence or oppression made by private persons.[4] It encouraged the officials themselves to watch and report the doings of their fellows.[5] It expected to be kept informed as to the state of their counties.[6] It was always ready

Act of Uniformity, to attend to the musters, to advance archery and shooting, to order watches and beacons, to punish vagabonds and seditious tale-tellers, to see that justices of the peace take the oath and nominate successors to those that die, to take account of their doings, "and not to spare negligence even in a principal officer;" as he cannot, owing to his duties at court reside in the county, he must nominate some chief man to take charge in his absence.

[1] Skeel, op. cit. 252, 281.

[2] Above 77 n. 9; it was not till the eighteenth century that the Lord-Lieutenants got exclusive control over the appointment of the justices of the peace; the judges of assize often advised the Council in the sixteenth century, Webb, Local Government, The Parish and the County 379-382.

[3] Thus, general charges were given by the Chancellor to the Justices in the Star Chamber, L. and P. xiii 2 App. no. 5 (1538); and see ibid xiv *i* no. 775 for an account of an address by Wriothesley of the Hampshire sessions in 1539; for later addresses see Hawarde, Les Reports etc. 20-21, 56, 101-102, 106, 186-189, 263, 367; in 1538 a circular was sent to all the justices as to the maintenance of the royal supremacy, L. and P. xiii *ii* no. 1171; cf. S.P. Dom. (1601-03) 125 for a report as to the unfitness of a certain Johnes to be high sheriff of Carmarthen; Atty.-Gen. v. Rowe (1629) Rushworth vol. ii Pt. ii App. 16, 17—a case of extortion and oppression by the head constable of Tavistock.

[4] See a complaint of this kind to Cromwell in 1538, L. and P. xiii *i* no. 126; Hawarde, Les Reportes etc. 23, 68, 334-336 (justices of the peace); 61-62 (coroner); 74 (sheriff); 134-139 (a councillor of the Marches and justice of the peace); 32-33 (justices of the peace and constables); 193-195, 248, 278 (purveyors); 153 (bailiff of the bishop of Rochester's manor courts).

[5] L. and P. xiv *i* nos. 532, 1089 (1539); Dasent vii 156 (1564)—a letter to the sheriff of Hampshire to report all that he knew against the mayor and bailiffs of Winchester in matters of religion; in 1569 a letter was sent to the sheriffs and justices of Yorkshire ordering the enforcement of certain statutes; the justices were told to advertise either the Council or the judges of assize, "by private and secret letters," if they thought that any of their fellows were negligent, Strype, Annals of the Reformation ii App. 87-89.

[6] Dasent v 161 (1555)—letters to all the justices of the peace, "marveyling they have not certified monethly hither the state of the shires."

to rebuke them individually [1] or collectively [2] for the neglect, or to praise them for the performance of their judicial or administrative duties.[3] And, no doubt, the effectiveness of their supervision was materially helped by the fact that in the commission for each county some Privy Councillors were always included.[4] But the nature of this control will be best appreciated from a glance at one or two illustrations taken from the innumerable cases which appear upon the records of the Council.

Over the choice of justices the Council exercised some supervision [5]—it directed, for instance, the removal of names from the commission for recusancy [6] and other causes.[7] It took some trouble to direct them as to the manner in which they should organize themselves for judicial work [8] and for county business.[9] It gave them directions as to the enforcement of statutes and as to other duties;[10] and once it arranged for a conference with the Norfolk Justices in London upon the question of the failure of the county to perform its duties.[11] On several occasions the county justices were ordered to leave London and attend to their duties in their own counties.[12] A very similar control was exercised over the mayors and justices of the boroughs. Directions as to the choice of the mayor and of other officials were frequently given.[13] Disputed elections were brought before the

[1] Dasent xxi 418 (1591)—a justice who had by his own authority released persons committed by his fellows; ibid 62-63 justices who had impeded proceedings against Egyptians were summoned before the Council.

[2] Ibid vi 119, 152 (1557); xiii 320 (1581-1582); xxviii 388-390 (1598); xxix 502 (1598-1599); Acts of the Privy Council (1613-1614) 392-393—the justices of Middlesex rebuked for the negligent administration of the criminal law.

[3] See generally Beard, op. cit. 118-124.

[4] C. J. Cox, Three Centuries of Derbyshire Annals i 30, 33-36; Offley Wakeman, Shropshire County Records vi *x*; J. Willis Bund, Worcester County Records i *iv-vi*; cf. L. and P. xiv *i* no. 775.

[5] Beard, op. cit. 119, 120; L. and P. xiii *i* no. 706—advice from the Council of the North to Cromwell on this matter.

[6] Dasent ix 233 (1576); x 168-169 (1577-1578).

[7] Ibid xiv 196 (1586)—a man "shewing himself froward in her Majestie's services;" xxv 514 (1593)—persons not assessed to the subsidy at £20.

[8] S.P. Dom. Add. (1566-1579) 20-22; below 147.

[9] Dasent ii 431 (1550)—instructions to divide themselves into four groups and to give orders for the due execution of the laws and statutes.

[10] Above 72 n. 8; see also Dasent v 176 (1555)—to punish false rumours; vii 289-290 (1574)—the justices of Huntingdon are to levy a contribution to repair a bridge; x 34-35 (1577)—orders as to a sentence in a case of riot and forcible entry.

[11] Dasent xxv 404-405 (1596).

[12] Ibid xiv 120 (1586); xxvi 405 (1598); S.P. Dom. (1598-1601) 347; in 1608 it was said that there were too many justices who never went near their counties except for hunting or hawking, and that in the commissions there were so many "newe and yonge knightes that come in their braveryes and stand there like an idoll to be gazed upon and doe nothinge," that the industrious justices were crowded out of the sessions house, Hawarde Les Reports etc. 367.

[13] L. and P. xii *ii* no. 692 (1537)—Town clerk of Worcester; ibid no. 1324 (1537)—Town clerk of Canterbury; Nicolas vii 243-244 (1541)—election of lord mayor of London; Dasent i 98 (1542-1543)—mayor of Hull; vii 112 (1557)—

Council.[1] On one occasion it was asked to devise a new procedure for the election of mayor.[2] Abuses of authority were promptly dealt with. The town of Poole found that it could not levy new import duties as it pleased,[3] and Shrewsbury that it could not levy unreasonable market tolls.[4] London found that it could not go on electing non-residents to municipal office with a view to enforcing the fine for not serving.[5] The circulation of a seditious libel on the mayor of Norwich called forth pertinent enquiries as to the manner in which the town had provided for the relief of the poor.[6] The acts and omissions of sheriffs and their deputies,[7] of a clerk of the peace,[8] of coroners,[9] and even of constables[10] were enquired into and rebuked.

On the other hand, the Council was not slow to vindicate the authority of these local authorities. "Let all men hereby take heede," it was said in 1603 in the Star Chamber, "how they complayne in wordes against any magistrate, for they are gods; and he must have verye good matter that will goe aboute to Conuynce (sc.) them, for feare he overthrowe not himselfe."[11] Those who impeded the justices or the sheriffs in the execution of their duties were dealt with summarily by the Council, or by one of its branches in the North or in Wales.[12]

It is not surprising to find that the Council regularly assumed jurisdiction to hear disputes either (1) between these different bodies, or (2) between the different members of these bodies. (1) In 1600 the Council sat at the lord mayor's house in London

mayor of Rye; ix 197, 199 (1576)—Hereford and Lynn; ibid 251—election of constables at Maidstone; x 168 (1577-1578)—a request to the corporation of London to grant an office to a certain person.

[1] Dasent x 27-28 (1577)—election of mayor at Dover; xiii 273-275 (1581)—of a recorder at Thetford.

[2] Ibid x 314 (1576)—Dover.

[3] Ibid viii 375 (1575).

[4] Ibid xxviii 360 (1597-1598).

[5] Ibid xvii 4 (1588-1589).

[6] Ibid xxv 88-89 (1595).

[7] Ibid v 118 (1555)—an unauthorized stay of execution; x 48 (1577)—a charge of partiality; xi 55 (1578-1579)—sheriff fined for unlawful stay of execution; xviii 239, 243 (1589)—non-execution of writs; xix 109 (1590)—sharp practice; ibid 470—wrongful imprisonment by an under-sheriff.

[8] L. and P. xi no. 158.

[9] Dasent ix 4 (1575)—a direction to return a jury—xxii 238-240 (1591-1592)—rebuke for partial conduct at an inquest.

[10] Ibid xiii 29 (1581)—negligence in not apprehending certain persons; xxxii 152 (1601)—complaint of fraud against a constable; Star Chamber Cases (C.S.) 136 (1633).

[11] Hawarde, Les Reportes etc. 177; see ibid 71—a person who had successfully sued a constable for acts done under the instruction of a justice of the peace was punished. Perhaps the most striking illustration of this point of view is to be found in the case of Falkland v. Montmorris and others (1631) Select Cases in the Star Chamber (C.S.) 1.

[12] Nicolas vii 33, 40, 43, 45 (1540)—an affray against a justice for disclosing matters to the Council; Dasent vii 175 (1564)—a letter to the Council of the North as to a riot raised against a sheriff to prevent the execution of a writ of redisseisin; xix 297—a case of resistance to the execution of process by a sheriff; Hawarde, Les Reportes etc. 104, 182-186.

to hear a dispute between the mayor and merchants of London, and the mayor and merchants of Newcastle, which turned upon the right of the town of Newcastle to charge certain dues on lead and coal.[1] The same year the Council of the North was directed to hear a complaint of the infringement of market rights of Scarborough by the establishment of an illegal market at Seamer.[2] In 1573-1574 we have an account of the beginning of the long dispute with the common lawyers as to the geographical limits of the jurisdiction of the Council of Wales and the Marches.[3] The question whether the city and county of Worcester were included was raised by one Wilde, and "certain lawyers;" and it was decided by the Council that they were included.[4] In 1600 the question whether Berwick was outside the jurisdiction of the Council of the North was before the Privy Council.[5] (2) In 1591 the Council was arbitrating between the justices of Norfolk and Suffolk and a deputy-lieutenant of Norfolk, who was thought to have acted unfairly in the execution of the commission for the repair of highways.[6] In 1592 it was considering a case of two justices of the county of Northampton, who, having attacked one another in open sessions, had been bound over to keep the peace by their fellows.[7] In 1597-1598 it was listening to charges of malversation against the town of Newcastle.[8]

The establishment and the maintenance of internal peace and effective government was the lasting work of the Tudor dynasty. We cannot understand either the difficulty of the task or the manner in which it was fulfilled, unless we bear in mind this laborious attention to small questions of local government and to local disputes, which was displayed by the Council all through this period. Its honesty and impartiality, its tact and skill, earned for it the gratitude of thinking and law-abiding citizens, and go far to explain why the nation as a whole acquiesced in the large powers which it assumed in other directions. Its labours in the field of local government were in a sense the foundation upon which its powers rested; for they gave it an intimate knowledge of the state of the nation, and of the state of public opinion; and they accustomed the nation to the control of a strong, firm, and just government.

[1] Dasent xxx 425-429, 453.
[2] Ibid xxxi 5-7.
[3] Vol. i 510-512.
[4] Dasent viii 200, 204, 217, 234, 236-238.
[5] Ibid xxxi 143-144; for other instances see Acts of the Privy Council (1613-1614) 84-86—University of Cambridge and the Cambridgeshire Quarter Sessions; ibid 131-134—the city of London and the privileges of the Tower; ibid 219-221—city of York and Council of the North.
[6] Dasent xxi 244-245.
[7] Ibid xxiii 286, 333, 367; see Acts of the Privy Council (1613-1614) 103-104—refusal by mayor of Newcastle to admit a duly elected alderman.
[8] Dasent xxviii 317-319.

(ii) *The Council and the National Church.*

Equal in importance to the task of supervising and controlling the local government, and intimately bound up with it, was the task of supervising and controlling ecclesiastical affairs. Ever since the Reformation had been begun, the domestic and foreign policy of the state had been in a large measure determined by its attitude to religious controversies. These controversies were the burning questions of the day; and any grave mistake in the ecclesiastical policy pursued would have imperilled the peace, and perhaps even the existence of the state.[1] The religious settlement of Henry VIII. and Elizabeth had connected church with state in an intimate union.[2] This intimate union had added a whole series of new powers and duties to the state, which devolved partly upon the existing machinery of ecclesiastical courts and officials, and partly upon the existing machinery of secular government.[3] But, as in other departments of government, it was the Council upon whom devolved the duty of seeing that all these various courts and officials, ecclesiastical and secular, did their appointed work.[4] Thus it gave directions to the bishops as to the exercise of their powers as to dealings with heretics, and as to many other duties.[5] It consulted with them as to the state of their dioceses,[6] and as to the best manner of enforcing the law.[7] It issued orders and directions to the court of High

[1] Above 38-39, 47-48. [2] Vol. i 589-598; above 37, 45.

[3] See e.g. 5 Elizabeth c. 1—an act for the better assurance of the royal supremacy—the justices of the peace, the King's Bench, and the bishops are all given power to enforce the Act.

[4] Dasent i 126 (1543)—a commission is sent into Kent to enquire into religious enormities; see also Gee, The Elizabethan Clergy 9 n. 1 for the instructions issued to the justices of the peace as to the oath of supremacy, and the enforcement of the Act of Uniformity; the commission to administer the oath of supremacy issued in 1558 consisted of the whole Privy Council, see ibid 34.

[5] S.P. Dom. Add. (1561) 514-515—suggestions as to the ordinations and other duties; Dasent vii 22 (1558)—the bishop of London is directed to hear a charge of conjuration; ibid 142 (1564)—the Archbishop of York and the Council of the North are to look into a case of ill-usage of a parson, and to keep safely Dr. Babington lately returned from Louvain; xiii 47 (1581)—letter to the bishop of Norwich as to the suspension of a parson; xiii 57, 58 (1581)—the bishop of Chester directed to proceed before the High Commission against an obstinate papist; viii 140 (1573)—letters to divers bishops as to the observance of the Act of Uniformity; xi 367 (1579-1580)—a letter to the bishops complaining that some ministers apply themselves only to preaching to the neglect of the sacraments; ibid 456—charges of fraud against the bishop of London's servants, who had cited persons without cause before the High Commission; xxi 40 (1591)—letter to the bishop of Durham and others to protect from molestation a man who had been active in searching out papists.

[6] Ibid viii 5 (1570-1571)—the archbishop of Canterbury is to call the bishop of Chester before him to account for the state of his Diocese.

[7] Ibid xiii 176-177 (1581)—a conference directed between nominees of the Council and the Bishops of London, Rochester, and the Dean of St. Paul's as to Campion's confessions and the spread of popery.

Commission as to the hearing of cases;[1] it even listened to complaints against it;[2] and it treated the other ecclesiastical courts in a similar manner.[3] It was in constant communication with the sheriffs, justices of the peace, and judges of the Assize as to the discovery and detention of recusants, and other offenders against the statutes relating to religion, whether Protestant or Catholic.[4] It issued directions as to the examination of such persons;[5] it took steps to verify the confessions extorted from them;[6] and it gave directions for their trial.[7] Any serious disputes between ecclesiastical dignitaries generally came before it;[8] and it would even interfere to protect an ordinary parson if it thought that he was unduly troubled by his neighbours.[9] It did not hesitate to suspend ecclesiastical dignitaries if it thought that they had been guilty of illegality or irregularity;[10] or to entertain applications from clergy who had been suspended by their ecclesiastical superiors.[11] It took upon itself to imprison for ecclesiastical offences, or to release on bail or otherwise those who had been imprisoned by other courts or officials.[12]

[1] Dasent vii 127 (1562)—direction to expel a heretic Dutchman; 145 (1564)—to hear a case of contempt against an archdeacon and a parson; xi 386 (1579-1580)—a case removed from the bishop of Exeter to the High Commission; xxv 211 (1595-1596)—to sift a charge of simony and incest brought by parishioners against a parson.

[2] Ibid viii 114 (1573)—a direction to proceed with a charge of incest and adultery which had been pending two years.

[3] Ibid xii 4 (1585)—an administration suit, the bishop of Norwich and others directed to enquire; xviii 18 (1589)—injunction to the Dean of the Arches in a matrimonial case.

[4] Ibid vii 65 (1558-1559)—to the sheriff of Devon to suppress unlicensed preaching; ibid 87-88—a similar letter to the sheriffs of Essex, the bailiffs of Colchester, and the justices of the peace; x 79, 80 (1577)—to Sir J. Forster and other justices of the peace of Northumberland as to popish refugees on the border; ibid 310-313—directions as to recusants in the eastern counties; xviii 278 (1589)—the charges of a custodian of recusants; ibid 413—letters to the judges of Assize for Derby and Stafford as to the indictment of recusants, and if they cannot comply they are to give orders to the justices of the peace.

[5] Ibid xix 292 (1590)—as to the examination of certain prisoners in the Fleet with a view to the discovery of the author of the Marprelate libels.

[6] Ibid xiii 184-185 (1581)—verification of Campion's confessions.

[7] Ibid xviii 338 (1589-1590)—a direction to the Attorney and Solicitor-General to see if there is sufficient evidence to put Jesuits on trial.

[8] Ibid x 336 (1578)—the bishop of Norwich and his chancellor; xii 64 (1580) disputes between the Dean and the Archbishop of York.

[9] Ibid xxviii 347 (1597-1598).

[10] Ibid iii 494 (1551-1552)—the Archdeacon of Cornwall suspended; Elizabeth suspended Grindal, the Archbishop of Canterbury for five years, Hallam, C.H. i 198, 199.

[11] Dasent xiii 46-48.

[12] Nicolas vii 285 (1541)—a curate committed to the Fleet for expounding the 8th chap. of Daniel in such a way as to reflect on the king; ibid 182—the bishop of London's chaplain charged with seditious words in a sermon; ibid 221—a priest who had not erased Thomas Becket's name from his prayer book; Dasent i 97 (1542-1543)—persons are committed by the Council to the Fleet for heretical opinions, and, ibid 106, 114 (1543)—for eating meat in Lent; ibid ii 147 (1547)—a charge of speaking against the removal of images, and ibid 379 (1549-1550)—of speaking against the service book; xiii 41 (1581)—all recusants ordered to be released on bail.

The due regulation of ecclesiastical affairs was thus a large item in the multifarious business of the Council. But, on the other hand, the fact that the church was incorporated with the state enabled the Council to make use of the ecclesiastical organization to help the government of the state. Thus it could, as we have seen, ask the bishops for their advice on ecclesiastical matters.[1] It could get information from them as to the religious state of their dioceses; and such information was necessary to enable it to appoint justices of the peace who were favourably disposed to the new order.[2] The higher clergy could, as justices, take some part in the enforcement of statutes which protected the established church, and in the other work of local government. But the greatest contribution which the ecclesiastical organization made to the government of the state is to be found in the parochial system of the Church. We shall see that the parish was adopted by the state as the rating and administrative unit of the new system of poor relief, and that it gradually became, and still remains the rating unit upon which much of the system of local government is based.[3]

In these various ways the work of the Council in thus supervising and directing the justices of the peace, the bishops, and the ecclesiastical courts, gradually effected the actual incorporation of church and state upon the terms and conditions laid down by the statutes of Henry VIII. and Elizabeth.

(iii) *The Council and the Judicial System.*

Supervision of the machinery of local and ecclesiastical government naturally connects itself with supervision of the judicial machinery of the state. The local government was still, to a large extent, conducted by courts acting through judicial forms, and controlled by the judges of assize and the central courts of common law.[4] The sessions of the justices of the peace were the most important part of the machinery by which that government was conducted; and, as we have seen, by direct orders and constant supervision the Council made that machinery do its appointed work.[5] But obviously the judges of assize and

[1] Above 81 nn. 6 and 7.

[2] See the letters from the bishops to the Privy Council 1564, Camden Soc. Misc. ix; they are replies to questions put to them by the Council as to the disposition of the existing justices of the peace, as to who ought to be made justices, and who removed; cf. Dasent xiii 270, 271 (1581)—the justices of the peace of Staffordshire are to bring up the grand jury before the judges of assize, because they have refused to find true bills against persons certified to be recusants by the bishop.

[3] Below 155-158.

[4] Above 75-76; below 165; vol. i 272-273, 284, 293, 297; cf. Dasent xvi 69, 70 (1588)—a case where the justices of the peace were impeded by defendants, who got their release by writs of certiorari and habeas corpus, and then sued the constables by action of false imprisonment.

[5] Above 72-73.

the courts of common law must be likewise supervised by the Council, if their control of the justices of the peace, and if their extensive civil and criminal jurisdiction in the spheres of public and private law were to be so exercised as to aid the Council in imposing on the country the new standards of efficient government which were needed to secure its safety and prosperity. Moreover this supervision was essential for a different but allied reason.

We have seen that many new courts and councils had either come into existence or had enlarged their jurisdiction during this period. Though the system of common law jurisdiction still stood its ground, the Council itself and the Star Chamber, the Councils of the North and of Wales, the Chancery, the court of Requests, and the Admiralty were encroaching upon its sphere.[1] An umpire was needed between these rival courts and clashing jurisdictions. The Council and the Star Chamber claimed to hold this position; and in the sixteenth century this claim was conceded. "By the wisdom of its supereminent authority," says Lambard, "all other courts of law and justice that we have are both the more surely supported, and the more easily kept and managed."[2] Thus the Council was in the habit of issuing orders to the judges of the different courts as to the conduct of cases.[3] It stopped,[4] delayed,[5] and expedited[6] actions, gave directions as to their hearing,[7] issued injunctions, and gave directions as to the issue of prerogative and other writs.[8] In one instance it dictated the conditions under which judgment was to be given by the court of Admiralty;[9] and in another it deliberately overrode its

[1] Vol. i 414-415, 459-463, 509-514, 553-556; below 273-274, 284.

[2] Archeion 217—he is speaking of the Star Chamber; see e.g. S.P. Dom. Add. (1569) 73, 74 for an opinion of the judges given at the Queen's request as to the jurisdictions of the county Palatine of Chester and the Council of Wales.

[3] L. and P. iv *ii* no. 3926—to the judges of assize; Dasent iii 159, 160, xiv 149, 237, 299, xx 56, xxi 66—to the common law judges; ibid iii 323, 366—to the Lord Chancellor; ibid viii 97, xx 22—to the court of Requests; ibid v 237-238—to the Chancery; ibid xii 27—to the council of Wales; ibid v 141, xix 4—to the judges of Assize; ibid xix 175—to the council of the North.

[4] Ibid vi 31; vii 212; viii 14; x 37, 38, 146; xi 63; xix 18, 101, 112, 268; xx 37; xxi 177; xxii 52, 70, 490; xxvii 31; cf. xx 67—an action on the case, brought for words contained in a petition to the Council, summarily stopped; Acts of the Privy Council (1613-1614) 320-321—the justice of a judgment by the court of Exchequer referred to a committee.

[5] Dasent xxii 207 (1591-1592)—an action affecting the Queen was not to be proceeded with till the Queen has been consulted; as to the controversies raised in James I.'s reign by the attempt to exercise this prerogative see vol. v 439-440.

[6] Ibid xi 59; xiv 298; xix 62; xx 26; xxi 95, 121; xxii 235, 250; xxiv 11, 12—orders to witnesses, summoned by common law process, to appear that there may be no delay.

[7] Ibid viii 307; xi 470; xvii 79, 80; xxii 528—a direction to end long suits in law by arbitration.

[8] Ibid xix 345; xx 155 (injunctions); xi 236; xix 297 (issue of writs).

[9] Ibid xix 251, "We thinck fit in the sentence to be given by you, you shall have speciall regard to th' observance of th' order and decree heretofore set down by us in this cause."

decision.[1] It rebuked courts which in its opinion had permitted irregularities in their procedure.[2] It maintained a strict control over the findings of juries;[3] and, in a proper case, it claimed to be able to convict and punish, even though punishment had been inflicted by the justices of the peace.[4] Its ruling determined conflicts of jurisdiction between rival courts and Councils.[5]

This large control exercised by the Council over the judicial system of the country, coupled with the equally large control which it exercised over all bodies and officials entrusted with governmental functions, was tending to introduce a conception of the legal relations of the crown and its servants to the law and to the subject very different from that which had been held in the Middle Ages. In the Middle Ages the common law was, as we have seen, regarded as the law by which all—rulers and subjects alike—were governed.[6] But these activities of the Council tended to foster the continental idea that the crown and its servants were outside the ordinary law, that the servants of the crown were governed by special courts and a special law, and that in their dealings with the subject they need not necessarily be bound by the common law. Complaints against servants of the central or local government from the highest to the lowest, whether made by the crown or a subject, were entertained by the Council.[7] In a case in which it had been proved that purveyors had wrongfully taken timber, the culprits were punished, and it was said that the king was dishonoured if his subjects were thus oppressed.[8] The servants of

[1] Dasent xxv 474; see also Acts of the Privy Council (1613-1614) 262-263.

[2] Dasent xxii 125, 126, 352, 353 (the Admiralty); xxii 268, xxviii 348 (the court of Delegates); xxii 341 (the council of Wales); xxvi 92, 93 (1596)—an order to stop an action in the Common Pleas in which the position of the court of Requests was controverted; xxvii 31-33 (1597)—the Common Pleas to cease hearing a case which should have gone to the Admiralty.

[3] Vol. i 343-344; Dasent vi 382, 411 (1558); vii 206-207 (1564-1565), 347 (1567).

[4] Pulton, De Pace Regis et Regni (Ed. 1609) f. 25, cited Tudor and Stuart Proclamations i *xxi* n. 25; Hudson, Star Chamber Pt. II § xv.

[5] Dasent vii 12, xiv 317—the Admiralty and the King's Bench; xxix 367, 368—a rebuke to the King's Bench for causing delays by prohibiting the Admiralty, and xxx 343 Yelverton and Bacon appointed to arbitrate; xxvii 180—the Admiralty and the Common Pleas; xviii 35-36—conflict between the common law and the ecclesiastical law; xvi 48—release by common law courts, on writs of habeas corpus, of prisoners committed by the Council; cp. vol. i 510-512—for the disputes as to the jurisdiction of the council of Wales and the Marches, and as to the jurisdiction of the council of the North.

[6] Vol. ii 195-196, 252-255, 435-436.

[7] Davison's Case (1587) 1 S.T. 1229; Hudson, Star Chamber, 64, 109, 111; at p. 109 he says, "The breach of duty of any of the king's great council is here and ever hath been examinable;" and this is fully borne out by the Council records, see e.g. Nicolas vii 246; Dasent vii 241 (1565)—purveyors; xiv 389; xv 88; xvi 18; xxvi 411; xxix 655, 666; Hawarde, Les Reports etc. 33—justices of the peace and constables; 61-62—misdeeds of a coroner; 68, 334-336—justices of the peace; 74—a sheriff; 134-139—a councillor of the Marches; cf. Atty.-Gen. v. Bent (1634), Rushworth vol. ii pt. ii App. 63-64; Atty.-Gen. v. Hillyard (1634) ibid 68-69.

[8] Hawarde, Les Reportes etc. 278.

the state had little difficulty in persuading the Council to interfere on their behalf if they were unjustly accused,[1] if they were wronged, or if they found themselves in legal difficulties.[2]

We have seen that the Council was constantly called upon to settle disputes between the various officials and bodies entrusted with the local government of the country.[3] At the latter part of Elizabeth's reign refusals to pay rates made to raise the contributions for military and other purposes ordered by the Council,[4] disputes as to the assessments made by the local authorities,[5] and objections to these rates on the score either of their illegality or their unpopularity were considered by it.[6] Naturally it tended to rely upon its "high and pre-eminent power" in all cases which it considered "might in example and consequence concern the state of the commonwealth,"[7] and to assign reasons of state for the arrest of private citizens,[8] and for other governmental orders,[9]

This tendency was noted and deplored by Hawarde;[10] and both from his reports and from other sources it is clear that,

[1] Nicolas vii 101, 102 (1540)—a false accusation against Wriothesley; Dasent i 33 (1542); x 262 (1578); xi 348 (1579); xxiv 33, 34 (1592).

[2] Above 79 and nn. 11 and 12; Dasent xi 236, xxiv 43—two prohibitions against suing a servant of the crown at common law; xv 69, 299—a protection to justices of the peace against vexatious legal proceedings; cf. xix 109, xxii 192-193, 398—orders to stop an action against a warden of the Fleet; ibid 526—a person summoned to answer for an insult to the Earl of Bath while acting as Lord-Lieutenant; there was much indignation when an official of the Council of the North was sued in the Common Pleas, ibid xxiv 468, 485, xxvi 140; cf. iii 8; xxix 727; xxxi 193; Acts of the Privy Council (1613-1614) 23-24, 158-159.

[3] Above 79-80.

[4] Dasent xiii 34; xviii 267; xxi 319; xxxii 397-398.

[5] Ibid xx 320, 321; xxi 269, 271; xxiv 131; xxvi 188, 407; xxvii 221; xxix 414, 499, 561, 588, 597-599; xxx 149, 154; it appears, xxx 38, that noblemen attendant on the queen were exempt in consideration of the expense of their attendance.

[6] Strype, Annals iii App. 30.

[7] Bacon, History of Henry VII.; Hudson, Star Chamber 127, talks of its jurisdiction to deal with, "Unusual and perhaps desperate inventions, which, in short time, may be very like to endanger the very fabric of the government."

[8] Dasent xx 100, 127—the case of Sir Th. Fitzherbert who was charged, "with certaine matters of greate importaunce, that concerned her Majestie and the State;" cf. ibid xviii 367; xxii 207, 512.

[9] Lambard, Archeion 89, says, that there are some "rare matters" which "must be left to the aid of absolute power and irregular authority;" Dasent xxx 639; xxxi 49; xxxii 499—a resolve to entertain no suit whereby any cause de pending before any ordinary court might be interrupted "unlesse upon extraordinarie occasion."

[10] Les Reports etc. 78-79—"the Lord Keeper and others of the Queen's Council, and the judges also, being so instructed, intend redress for such offences, and many others in the commonwealth, by the Queen's prerogative only, and by proclamation, councils, orders, and letters; and thus their decrees . . . shall be a firm and forcible law, and of the like force as the common law or an Act of Parliament. And this is the intent of the Privy Councillors in our day and time, to attribute to their councils and orders the vigour force and power of a firm law, and of higher virtue and force, jurisdiction and preheminence, than any positive law, whether it be the common law or statute law. And thus in a short time the Privy Councillors of this realme would be the most honourable noble and commanding lords in all the world."

though the Council professed to desire to uphold the law in ordinary cases,[1] it would, if necessary, make the ordinary law yield to what it considered to be state necessity.[2] Thus, we find it laid down in the Star Chamber that, "exorbitante offences are not subjecte to an ordinayre course of law;"[3] and that in case of necessity no precedent is needed as, "they can make an order according to the necessity and nature of the thinge itself."[4] A striking instance of the application of these principles is a case in which the Council directed a gaoler to disobey a writ of habeas corpus, and to make a return that the commitment was by the queen's special command.[5] It is clear that the ideas which underlie these activities lead directly to the growth of a system of administrative law, and that in all questions of doubtful jurisdiction the Council was claiming to exercise the powers of a *tribunal des conflits*. It is equally clear that the powers thus assumed were gradually undermining the legal securities for the liberty of the subject. Those who were bold enough to complain or criticize soon found themselves committed to prison for an indefinite period;[6] and they were lucky if they escaped with an abject apology and a recantation of their political errors.[7]

It is true that the powers of Parliament were to some extent a security for the maintenance of the liberty of the subject. But as with the rules of the common law, so with the powers of Parliament, the influence of the Council prevented them from being

[1] Dasent xxx 697—a case more fit for ordinary law sent to be heard by the two Chief Justices.

[2] Ibid xxxii 100—the city of London had made certain rules for the company of carmen, the validity of which had been questioned by the company in the King's Bench. The King's Bench decided against their validity, and the City appealed to the Council; the Council said that it would hear what the Chief Justice of the King's Bench had to say because "it is convenient that wee mayntaine and hould as good agrement and correspondence as wee may betwixt our proceedinges in matters of State and the practize of the Lawe;" but in the end (p. 421) the validity of the rules was affirmed.

[3] Hawarde, Les Reports etc. 292.

[4] Ibid 144.

[5] Dasent xxiii 330; cf. ibid 95, 159—in that case the cause assigned was, "the speciall service of her Majestie and the State," a ground admitted by the judges in 1591 to be a good cause for refusing to release a prisoner, vol. i 509; Hallam, C.H. i 234-236; Prothero, Documents, 446; vol. v App. I.; vol. vi c. 6.

[6] See the case of Sir John Smythe who had made speeches "pretendinge that by the lawes of the realme no subject ought to be commanded to goe out of the realme in her Majestie's service," Dasent xxv 459, 460, 475, 501 (1596); he was still under surveillance in 1600, ibid xxx 177, 249

[7] Robert Tailboys was committed to prison because he took upon him to "examyne the lawfull aucthorite of leavying of money for her Majesty's service," Dasent xxvi 138 (1596), but was released later in the year on making humble submission, ibid 318, 319; cf. ibid xxviii 400 (1598), a rebuke to Sir John Savile and the other justices of the West Riding for delays in collecting ship money, and for calling its legality in question; for an earlier case of 1595-1596 in which Savile supported unsuccessfully the Yorkshire justices against the Council of the North see Reid, King's Council in the North 336-339.

quite as efficient a security for its maintenance as they afterwards became. But to understand the reasons for this we must consider the views held by the lawyers and statesmen of this century as to the constitutional position of Parliament in relation to the Council.

(iv) *The Council and Parliament.*

With the sphere of Parliament's activity under the Tudors, and with the effects of that activity upon the development of the English state and of English law, I shall deal later.[1] At this point I shall consider only its relations to the crown and the Council. All through this period the crown and Council exercised a large control over it. As with the local government, so with Parliament, this control increased its efficiency, and thus played no small part in fitting it to fill the great position in the state to which it attained in the following period.

Just as Fortescue had suggested the plan of governing England through a reformed Council, so he foreshadowed the relations which should exist between this Council and the Parliament. The Council was to deliberate and propose, and Parliament was to discuss their proposals—"Wherethrough the Parliaments shall do more good in a month to the mending of the law, than they shall now do in a year, if the amending thereof be not debated, and by such council riped to their hands."[2] In this sentence we have a substantially correct description of the relations between the crown and Council on the one side, and Parliament on the other, during the greater part of this period.

The permanent government of the state was carried on by the king and Council. They determined the policy of the state. They initiated all important legislation. In fact, as Mr. Tanner has pointed out, the infrequency of Parliaments, and the shortness of their sessions, made it impossible for Parliament to control the executive, and prevented the growth of any organized opposition.[3] It is not therefore surprising to find that the legislation initiated by Parliament was of comparatively small importance. It was concerned generally with such matters as the regulation of abuses in particular trades or manufactures, or the settlement of difficulties in the local government of particular places.[4] The great legislation of the period—the legislation which modified the

[1] Below 174-190. [2] Governance of England c. xv.

Constitutional Documents 515-516.

[4] L. and P. v no. 124 (1531), Chapuys reports of the Parliament that, "they are discussing the enactment of the sumptuary laws and the prohibition of the pastime of cross bows and handguns, especially to foreigners. . . . Nearly the whole time of Parliament has been occupied with these petty matters, and with complaints between different towns and villages;" cf. Fisher, Political History of England v 165, 246.

constitutional law of the English state, and transformed its ecclesiastical law, which created the poor law and made important changes in the criminal law—came from above.[1] Parliament was not expected to busy itself with any large questions of policy, whether relating to domestic or foreign affairs, which were not submitted to it. If such questions were submitted to it, if its advice were asked upon any matter of foreign policy with a view to a money grant, or upon any matter of domestic policy with a view to some new scheme of legislation, or upon commercial matters, then it might discuss and criticize, amend, reject, or approve.[2] It was not expected to initiate these discussions on its own account.[3] When the rebels in the Pilgrimage of Grace demanded a "free Parliament" in which no minister of the crown had a place,[4] they had in view a Parliament which would be free to criticize on its own initiative the whole policy of the recent religious changes, the whole conduct of the government by the Council, and the character and the shortcomings of the king's ministers. To such freedom as this Parliament never attained during the Tudor period. The Tudor sovereigns always maintained that, though Parliament might amend or reject their proposals, the initiative rested with themselves.[5]

This comes out very clearly in Elizabeth's reign, because in that reign there was a growing opposition in the House of Commons, which claimed that Parliament could discuss freely any of the "griefs of the commonwealth," whether submitted to it by the crown or not.[6] The queen's marriage, the succession to the throne, and the government of the church, were three of the chief topics which the House of Commons made constant attempts to discuss;[7] and as the discussion of these topics was expressly prohibited, the queen naturally regarded such attempts as

[1] Redlich, Procedure of the House of Commons i 50, "The great legislative changes of the era of Henry VIII. and Elizabeth . . . were entirely the fruit of plans elaborated in the Council;" see below 96-97 for some illustrations of the manner in which the Council went to work.

[2] Below 90 n. 3. Its advice on commercial matters was sometimes asked, see e.g. L. and P. ii *ii* nos. 3204, 4076.

[3] Thus in 1580 the Lord Chancellor specially admonished the Speaker, "that the House of Commons should not deal or intermeddle with any matters touching her Majesties Person, or Estate, or Church Government," D'Ewes 269; the Speaker was sent for in 1592-1593 and the same views were expressed by the Queen herself, ibid 478, 479.

[4] L. and P. xi no. 1182 (16); cf. no. 1246 (12) and (15).

[5] Ibid xx *ii* no. 1030 (1545)—several Acts were lost in the Commons, and it is noted that the king did not much mind.

[6] See Peter Wentworth's speech in 1575-1576, D'Ewes 236-241, and the same member's questions in 1586, D'Ewes 411, both cited by Hallam, C.H. i 255, 258.

[7] See e.g. the petition for ecclesiastical reform of 1584, Tanner, Constitutional Documents 191-194. It is interesting to note that it is suggested that a writ de contumace capiendo be substituted for the writ de excommunicato capiendo—a reform not carried out till 1813, vol. i 632.

deliberate encroachments by the Parliament on the sphere of her prerogative and of the executive government.[1] "For libertie of speech," said the Lord Keeper to the Speaker in 1593,[2] "her majesty commaundeth me to tell you, that to saye yea or no to Bills, god forbid that any man should be restrained or afrayde to answear according to his best likinge, with some shorte declaracion of his reason therein, and therein to have a free voyce, which is the verye trew libertie of the house. Not as some suppose to speake there of All causes as him listeth, and to frame a form of Relligion, or a state of government as to their idle braynes shall seeme meetest, She sayth no king fitt for his state will suffer such absurdities." Bills which "pass the reach of a subject's brayne" were not to be received. "Liberal" but not "licentious" liberty of speech was granted. "For even as ther cann be no good consultacion when all freedom of advice is barred, so will there be no good conclusion, where everye man may speak what he listeth without fitt observacion of persones, matters, tymes, places and other needful circumstances." Members therefore should confine their speech within bounds, "being assured, that as the contrary is punishable in all men, so most of all in them, that take upon them to be Counsellors and procurators of the common wealth." Elizabeth throughout her reign consistently adhered to the view set forth in this speech;[3] but at the end of her reign the House was beginning to kick against it.[4] She found it impossible to stop the debate upon monopolies in 1601; but, with characteristic cleverness, she managed to stop the initiation by the House of legislation on this subject by promising to revoke all grants which should be found to be injurious to the subject, and contrary to law.[5]

On the other hand, the crown was anxious that upon all matters which it submitted to Parliament discussion should

[1] D'Ewes 285, 478 cited Tanner, op. cit. 570, 572.

[2] This extract is taken from J. E. Neale's version of this speech in E.H.R. xxxi at pp. 136-137; he points out that the version in D'Ewes, 460, is taken from an inferior MS. ibid 128-129.

[3] Bacon L.K. said in 1571, "they should do well to meddle with no matters of State, but such as should be propounded unto them, and to occupy themselves in other matters concerning the Commonwealth," D'Ewes 141, 142; in 1575 Sir Walter Mildmay, Chancellor of the Exchequer, said, "though freedom of speech hath always been used in this great Councel of Parliament, and is a thing most necessary to be preserved amongst us; yet the same was never nor ought to be extended so far, as though a man in this house may speak what and of whom he list," D'Ewes 259; on the whole subject see Tanner, Constitutional Documents 554-573.

[4] In 1601 Mr. Carey said, "We take it for a use in the House that when any great or weighty matter or bill is here handled, we straightway say it toucheth the Prerogative and must not be meddled withal; and so we that come to do our countries good, bereave them of that good help we may justly administer," D'Ewes, 671; cf. Mr. Wingfield's speech, ibid 646.

[5] D'Ewes 652, 653; below 347-349.

be free. In 1536 Henry VIII. "came in among the burgesses in the Parliament and delivered them a bill which he desired them to weigh in conscience, and not to pass it because he gave it in, but to see if it be for the common weal of his subjects;"[1] and in that reign, when Parliament did not as a rule attempt to discuss matters not submitted to it, there is no instance of any one being avowedly[2] punished for words spoken in Parliament. Indeed there is positive evidence that the privilege of freedom of discussion was well recognized.[3] In fact the existence of free discussion in Parliament was an essential part of the Tudor scheme of government. Henry VIII., as we have seen,[4] recognized that a free Parliamentary discussion of his legislative proposals was the best guide as to the extent to which it was safe to pursue a given line of policy; and this fact was equally clearly recognized both by Mary and Elizabeth. Moreover the powers or the prejudices of Parliament might occasionally be used as a diplomatic weapon, or as an excuse for the refusal of inconvenient requests.[5] But if Parliament was to be used in this way its privileges and its dignity must be upheld. They were upheld all through this period.[6] "We be informed by our judges," said Henry VIII. in *Ferrers's Case*, "that we at no time stand so highly in our Estate royal as in the time of Parliament, wherein we as Head and you as Members are conjoined and knit together into one body political, so as whatsoever offense or injury (during that time) is offered to the meanest member of the House, is to be judged as done

[1] L. and P. x no. 462.

[2] Ibid xiv *i* no. 1152 (1539) there is a hint that members of Parliament who had made motions against the legislation as to the Sacrament might be questioned as to who had inspired these motions; ibid no. 1108 it is reported that a too freely spoken member had been severely dealt with by the king's party; in 1540 the French Ambassador reports that certain merchants' goods had been confiscated because they had popish chaplains, but that the real cause was their speeches in Parliament the year before, L. and P. xvi no. 697.

[3] Ibid ii no. 1314, the bishops in Standish's case say that words spoken in convocation should be as privileged as words spoken in Parliament—this clearly shows that the privilege was fully recognized; when a member moved that Henry should take back his wife (Catherine), Henry argued with the House, but did not attempt to silence the particular member, L. and P. v no. 989 (1532); Cromwell (Merriman i 313) gives a graphic account of the miscellaneous topics discussed during the "xvii hole weekes" during which he "indured a parlyament" in 1523; and cf. L. and P. v no. 171 (1531) for an account of complaints as to the imposts and exactions; ibid viii no. 856, p. 326 (1535) for opposition to the new treason Act, and the insertion by the commons of the word "maliciously."

[4] Above 35-36.

[5] L. and P. iv *cxcii-cxciii*, *dliv*; ibid nos. 3105, p. 1404, 6733; ibid v nos. 45, 832, 886; vii no. 232, p. 94; xi no. 780 (2); xvi no. 182; cf. Select Cases in the Star Chamber (S.S.) ii *xx*.

[6] Strode's Case (1512), and the Act 4 Henry VIII., c. 8 passed in consequence of it; Ferrers's Case (1543) Hallam, C.H. i 268, 269; the dignity of the House was most amply recognized in Arthur Hall's submission in 1581, which was enrolled among the records of the Privy Council, Dasent xiii 8-11.

against our person, and the whole Court of Parliament."[1] It was only when men like Strickland,[2] Cope,[3] or the Wentworths, attempted to overstep the proper sphere of Parliamentary activity that we get interferences with the freedom of debate, which seem to us to be cases of the breach of Parliamentary privilege, because we have long been accustomed to a constitution in which Parliament holds a place very different to that which it held in the sixteenth century.

To maintain these relations between the crown and Council on the one side, and Parliament on the other, a large amount of tact was essential. If Parliament was to be a real representative assembly with real powers, the control of the crown and the Council must not be too obvious. But if the crown and the Council were to retain their hold over the conduct of the government, that control must be real. The Tudor sovereigns managed to satisfy these conditions with eminent skill. The House of Lords, decimated by the Wars of the Roses, cowed by Henry VIII., and weakened by the dissolution of the monasteries, gave no trouble.[4] The ecclesiastical opposition to the religious changes was overcome;[5] and all through this period it helped the crown to control the House of Commons.[6] The king could

[1] Parl. Hist. i 555, cited McIlwain, The High Court of Parliament 232.

[2] The Treasurer explained that Strickland was "in no sort stayed for any word or speech by him in that place offered; but for the exhibiting of a bill into the House against the prerogative of the Queen;" the modern view as to the extent of freedom of speech is contained in Yelverton's speech, D'Ewes 175, 176; in Paul Wentworth's protest in 1566, *ibid* 128; and in Peter Wentworth's protests in 1575 (ibid 242) and in 1587 (below 179).

[3] Ibid 411; for a further illustration of the Court view as to the extent of the privilege of freedom of speech see ibid 284.

[4] Pike, History of the House of Lords 349-351—in the reign of Edward III. the normal number of the temporal peers was 50, and at the beginning of Henry VII.'s reign it was 29; at the end of Elizabeth's reign it was 59, Firth, History of the House of Lords during the Civil War 1; at the dissolution of the monasteries 29 spiritual lords disappeared from the House, and ever since the temporal peers have enjoyed a constantly increasing majority over the spiritual lords; for a full tabular list of the changes in the peerage during this period, see the Forty-seventh Report of the Deputy Keeper of the Public Records 79-96; but, as Stubbs says, Lectures on Mediæval and Modern History 407, though the effects of the Wars of the Roses on the personality of the peerage were great, their effects on its political status and influence were greater—"it was attenuated in power and prestige rather than in numbers."

[5] L. and P. v no. 879 for their opposition to the Annates Bill; ibid no. 737 we are told that the bishop of Durham was not summoned because he was "one of the Queen's champions;" ibid vii no. 121.

[6] Hallam, C.H. i 313-315—in 1607, when the commons requested a conference with the lords on a petition of the merchants praying remedy for grievances against Spain, the Earl of Northampton said that the Commons had a private and local wisdom merely, and that therefore it is not fitting that they should examine into secrets of state; "and the commons seem to have acquiesced in this rather contemptuous treatment;" in 1566 the Commons asked the Lords' advice as to the proper course to pursue on the death of the Speaker, D'Ewes 95, 120, 121; in 1588-1589 the Queen stopped in the upper house two bills relating

directly influence its members by his presence in the House and otherwise.[1] It was far more ready to act with the king and Council than was the House of Commons,[2] and far less sensitive to supposed breaches of its privileges.[3] It was not till the following century that an opposition to the crown arose in that House.[4] The House of Commons was more difficult to manage; but both over its composition and over its business the crown and the Council succeeded in obtaining a large influence without impairing its representative character. Of the means which they employed to secure this influence I must now say something.

I shall deal in the first place with the control exercised over the composition of the House; and in the second place with the control exercised over its business.

(*a*) *The Composition of the House of Commons.* In the Middle Ages service in Parliament, like other kinds of public service, was regarded rather as a burdensome duty than as a coveted privilege;[5] and in the sixteenth century this idea still survived.[6] Indeed in this, as in many other respects, this century is the century of transition between the mediæval and the modern idea. During the greater part of this century the mediæval idea as to service in Parliament was predominant. Members of Parliament still expected to be paid their wages;[7] and if they could manage to

to purveyors and pleading in the Exchequer, ibid 440; in 1592-1593 the House of Lords attempted to dictate the amount of a subsidy, but this was resented, ibid 483, 485-487.

[1] See L. and P. vii nos. 73, 373 (p. 155); ibid xiv *i* no. 1003.

[2] The House of Lords and the Council agreed to drastic reforms in the land law which would have improved the king's revenue from feudal incidents in 1529, but it was not till 1535 that the Commons could be induced to consent to the modified proposals of the Statute of Uses, below 450-457; Cromwell was trying for four years to get the Commons to consent to the Statute of Proclamations, Merriman, Life of Cromwell i 123, 124.

[3] When Elizabeth in 1601 directed certain peers who had been implicated in Essex's rebellion not to obey the writ and absent themselves from Parliament the House made no complaint, Dasent xxxii 218, 219; cf. L. and P. v no. 737 (1532); xvi no. 1465 (1541); it was not till much later that the doctrine that all peers have an indefeasible right to a writ of summons arose, and perhaps that doctrine could even now be questioned, see article by Bellot, Law Mag. and Rev. xxxvi 65-77; at this period also the right to attend and vote by proxy depended upon royal licence, Acts of the Privy Council (1613-1614) 392.

[4] Firth, History of the House of Lords during the Civil War 33, 34.

[5] Maitland, Parliament Roll of 1305 (R.S.) lxxxvi; Fisher, Political History of England v 165; Porritt, The Unreformed House of Commons, i 155.

[6] See L. and P. i no. 5374 (1514) for an exemption granted to one John Mordaunt from serving on juries and being made a member of Parliament, together with the privilege of sitting with his hat on in the king's presence.

[7] Ibid iv *iii* no. 5962; Porritt, op. cit. 153; in 1586 Arthur Hall brought actions against his constituents for his wages; their defence was that he had been negligent in his attendance; and in the end a committee of the House persuaded Hall to remit his claims, D'Ewes 417, 418. Apparently in the county of Cambridge the money for knights of the shire had come to be charged on a certain manor, L. and P. xviii *i* no. 66; 34, 35 Henry VIII. c 24.

cut short their attendance, and so save their constituents a few weeks' pay, their action was appreciated.[1] It was necessary in 1513 to pass an Act against this practice;[2] but in spite of it, the Council found it necessary in 1559 to write to the sheriffs to admonish members who had departed with leave to return to their duties.[3] At the end of the century there are signs that the mediæval is giving place to the modern idea.[4] But it is clear that the prevalence of the mediæval idea during the greater part of the century very materially helped to give the crown and Council a large influence over the composition of Parliament—the burgesses could be told that, if they elected the persons whom they were instructed to elect, their representatives would cost them nothing.[5] Something could also be done, as Henry VIII. found, by granting leave of absence to members of the opposition;[6] but most could be done by direct nomination of court candidates and royal servants, by instructions and recommendations to the sheriffs and others responsible for the conduct of the elections, and by interference in the elections themselves. Of all these kinds of influence there is much evidence all through this period; and when, in the latter half of the century, the growing value attached to a seat in Parliament rendered them somewhat less efficacious, the crown and Council could fall back on their influence over the nobility, and the creation of rotten boroughs.

The rebels in the Pilgrimage of Grace alleged that the Parliament which had dissolved the monasteries had been nominated by the king from among his own servants.[7] There is evidence that such nominations were freely made by Cromwell;[8]

[1] Hist. MSS. Comm. 9th Rep. App. p. 152 (1532-1533)—a payment by the town of Canterbury to their member Bridges for saving wages by leaving Parliament after the Easter term.

[2] 6 Henry VIII. c. 16—no one is to depart from Parliament till it be fully ended without the licence of the Speaker and the House on pain of loss of wages.

[3] Dasent vii 74.

[4] Porritt, The Unreformed House of Commons, i 153; the last recorded case where wages was paid was a payment by Hull to Andrew Marvell in 1678; but as Mr. Porritt says, "While it is possible to cite . . . a few earlier seventeenth century instances of payments to members, it would be equally easy to cite ten times as many instances, prior to the last payment to Marvell, in which at the time of election constituencies exacted written pledges from members that they would not charge the statutory wages and expenses."

[5] L. and P. xiv *i* no. 520 (1539).

[6] Ibid v no. 120 (1531), above 36 n. 3.

[7] L. and P. xi no. 1182 (16); the same allegation was made by Chapuys in 1532; ibid v nos. 762, 941.

[8] Merriman, Life of Cromwell, 125-128; L. and P. vii no. 56; ibid x no. 852—an election was held at Canterbury and two burgesses were elected; then came an order from Cromwell and the Chancellor to elect two others, whereupon a fresh election was held and the court nominees were elected, ibid no. 929; ibid nos. 817, 903, 916; ibid xiv *i*; Introd. xxxviii-xlii; Hallam, C.H. i 265, n. *p.*; Dasent ii 516, 518, 519 (1547); iii 459, 470, 471 (1531-1532).

and that he actively canvassed for votes and influence.[1] But, though there are some later instances, the system of direct nomination gave way in the latter half of the century to more indirect methods. While professing in theory to maintain the principle that the election of members should be free,[2] the Council frequently sent instructions to the sheriffs as to the conduct of elections,[3] and both as to the particular candidates[4] and as to the kind of persons whom they wished to see elected.[5] The minute acquaintance which, as we have seen, it possessed of local conditions in all parts of the country enabled it to send the proper instructions to different parts of the country. A person who, among other offences, was bold enough to seek election as one of the knights of the shire for Derbyshire without consulting the Lord-Lieutenant, was summoned before the Star Chamber and reduced to make a humble apology.[6] The Council interfered not only to secure peace and order at elections, but also in many various kinds of controversy to which elections sometimes gave rise. Thus in 1547 it adjudicated in the case of a disputed election at Sandwich.[7] In 1586 it suggested that a new election should be held in Norfolk owing to the "unorderly" proceedings of the sheriff.[8] But it is clear from this case that the House was already beginning to assert its claim to adjudicate on such cases.[9] Nevertheless in 1601 the Council rebuked the sheriffs of Warwick and Hampshire for suspicious delays in the conduct of the elections;[10] and in 1551 and 1558 it had directed the issue of fresh writs to fill up the places of members deceased.[11] In some places the territorial influence of the nobility and large landowners could be used by the Council.[12] In Henry VIII.'s reign many of the nobility were deeply in debt to the crown,

[1] L. and P. vi no. 31 (1533).

[2] Dasent ii 518, 519 (1547); xxxii 271 (1601); cf. xiv 242 (1586), "Thoughe her Majestie hath no meaning to impeache any waye theyr free election, yet she thincketh some regard should have been had to suche letters as were sent from hence by her dyrections."

[3] Ibid iv 344 (1553); vii 39, 41 (1558-1559); xxxii 248, 271 (1601).

[4] Ibid xiv 227 (1586)—a recommendation to elect their old members; xxxii 251 (1601).

[5] Ibid xxvii 361 (1597)—a warning to choose fit persons; in 1553 circular letters were addressed to the sheriffs informing them that when the Council or any of them recommend men of learning and wisdom, their recommendations are to be followed, Hallam i 46; Porritt, The Unreformed House of Commons, i 373.

[6] Ibid xxiv 256-257 (1593).

[7] Ibid ii 536-537.

[8] Ibid xiv 241.

[9] D'Ewes 397-399; Tanner, Constitutional Documents 595-597; cf. Hallam, C.H. i 274-276.

[10] Dasent xxxii 247-248, 271.

[11] Ibid iii 400; iv 434.

[12] The Duke of Norfolk had boroughs in 1529, L. and P. iv *iii* App. no. 238; ibid x no. 816; he could also influence the elections in the counties of Nottingham and Derby, ibid no. 5993.

so that they could hardly refuse to comply with his requests.[1] When, in the latter part of the century, less reliance could be placed on this means of influence,[2] the rotten boroughs began to appear. Edward VI. and Elizabeth created many. The largest number of them were in Cornwall, no doubt because the influence of the crown over the Duchy was paramount.[3] But the creation of rotten boroughs to secure the influence of the crown was a hazardous expedient. Some of them seem to have fallen under the influence of the neighbouring landowners almost immediately;[4] and it is clear that if ever a widespread opposition to the crown should arise they could be used against it. But during this period this difficulty did not arise. The government was on the whole popular; and though the growth of an opposition in the House of Commons at the close of the period made it more difficult for the Council to control the composition of the House, these various expedients were, as a general rule, successful in securing a majority sufficiently large to enable it to control the course of business. To the manner in which this control of the course of business was exercised we must now turn.

(*b*) *The Control exercised over the business of the House of Commons.* We have seen that all through this period the initiative was with the Crown. It is probable that the legislative proposals introduced into Parliament were first discussed by the Council, and drafted under its supervision and that of the king.[5] Among Cromwell's papers there are frequent "rememberances" of Acts which he intends to introduce into Parliament[6]—three

[1] L. and P. iv Introd. dxlii.

[2] Dasent xvi 318-319 (1588)—a letter to Lord Ritch requiring him to desist from running a candidate for Essex in opposition to the two court candidates, the Queen's Vice-Chamberlain and the Lieutenant of the Queen's Pensioners.

[3] Edward VI. created 22, Mary 14, and Elizabeth 31; none of Mary's creations can be definitely said to be rotten boroughs; many of Edward's VI.'s were, and it was in his reign that "Cornwall first began to attain notoriety as a county of many boroughs;" most of Elizabeth's were rotten "from the beginning of their Parliamentary history," Porritt, The Unreformed House of Commons i 373-375; this view is questioned by Pollard, Evolution of Parliament 163; but the facts which he adduces may only show the speed with which these boroughs fell under the influence of the landowners, see next note; the existence of "decayed" boroughs was admitted in 1571, in the debate on the bill that burgesses should be resident, D'Ewes, 171.

[4] Above 95 n. 12; Porritt, op. cit. i 375, 376—in 1558 Newton in Lancashire was called "the borough of Sir Thomas Langton," and in 1594 the manor was sold with the right of returning two members; cf. for other instances Hist. MSS. Comm. 14th Rep. App. Pt. VIII. 49, 254, 255, 256; in 1586 a Mrs. Copley had the nomination of two burgesses for Gatton, while the Earl of Rutland owned the borough of Grantham, Porritt, op. cit. i 377, 378; cf. D'Ewes, 168, 170, 171.

[5] L. and P. v no. 722—several copies of Acts with corrections in Cromwell's hand; Henry himself corrected the preamble to the statute of Appeals, vol. i 589; cf. L. and P. vi no. 121; ibid vii no. 1611; ibid ix no. 725; ibid xiv *i* nos. 868, 869; Henry VIII.'s Proclamations show many alterations in his own handwriting, Tudor and Stuart Proclamations i *xiii*.

[6] See e.g. L. and P. vii nos. 48, 49.

famous examples are the statute of Proclamations,[1] the treason bills of 1530-1531, 1531-1532, and the Treason Act of 1534,[2] and the statute as to Annates;[3] and it is by no means impossible that he had a large share in drafting the famous statute of Uses.[4] In 1533 we have a long account of "things to be moved on the king's behalf unto his attorney, to be put afterwards in order and determination by the learned counsel against the next assembly of his Parliament."[5] Later in the century we find the Council appointing, before the meeting of Parliament, a committee or committees to consider the legislative proposals which were to be introduced. In 1558 the committee consisted of the serjeants at law, the Attorney and Solicitor-General, Sir Thomas Smith, and Mr. Goodrick.[6] In 1575-1576 the Chief Justices "and other Justices appointed to conferre for Parliament causes" were directed to consider "a certain bill and articles exhibited by one Peter Blackborowe against the clothiers of the counties of Wiltshiere and Somersett, appon prettence of a statute 50 *Philippi et Mariae,* to consider what is possible and convenient to be donne for the benifitte of the realme, and what imperfection to be amended in the Statute, that the same may be considered of at the next Parliament, and to advertise their Lordships."[7] In 1588 there was an extensive project of reforming the statute law; and the Council appointed committees from each of the four Inns of Court to make suggestions and report weekly to the Chief Justices, and the Attorney and the Solicitor-General.[8]

It would have been of little use to prepare carefully the proposals to be laid before Parliament, if means were not also taken to ensure their safe passage through Parliament. The crown and Council relied chiefly on the two following means for this purpose.

In the first place, though perhaps in theory the choice of the Speaker was free,[9] all through this period he was the paid nominee of the crown; and it was not till 1679 that he ceased to be "a link between the crown and the House."[10] Often he held some other

[1] Merriman, Life of Cromwell, 123-125.

[2] J. D. Thornley, Royal Hist. Soc. Tr. 3rd Series xi 88-90; 26 Henry VIII. c. 13.

[3] Merriman, op. cit. 133-135.

[4] Ibid 136-138—as Mr. Merriman says, we have no direct proof o Cromwell's connection with this measure, but that, "the attainments needed to plan and draft such a statute were precisely those which Cromwell possessed in the very highest degree—intimate knowledge of the law, and great shrewdness in finance;" cf. Egerton Papers (C.S.) 11-13 for a note of some things to be passed by the Parliament of 1549, possibly drawn up by some Privy Councillor.

[5] L. and P. vi no. 1381.

[6] Dasent vii 28—"For the consideracion of all thinges necessary for the Parlyamente."

[7] Ibid ix 73. [8] Ibid xvi 416-418. [9] D'Ewes 41.

[10] Porritt, op. cit. i 433; on the whole subject see ibid chap. xxi.; Redlich, Procedure of the House of Commons ii 156-168. His fee from the crown was

office under the crown.[1] His duty was quite as much to represent the views of the government to the House,[2] as to represent the views of the House to the crown.[3] He explained bills to the House; he withdrew bills which had been introduced contrary to the royal commands; and during the greater part of this period he determined the order in which they were brought before the House.[4] At the end of this period, however, the House began to assert a right to override the decision of the Speaker[5]—the movement is already beginning which will gradually make the Speaker less and less the servant of the crown, and more and more the servant of the House.

In the second place, a certain number of Privy Councillors were always members of the House.[6] They could thus explain and justify the measures of the government,[7] make concessions to an opposition that seemed likely to prevail,[8] or avert defeat by withdrawing measures to which the sense of the House was

generally £100, L. and P. iii *ii* no. 3267—in this letter Wolsey tells the king that it is usual to give £100 additional to the Speaker, and he recommends that it be given to More for his "faithful diligence" in the Parliament of 1523; Coke in his personal notes in Harl. MS. 6687 printed Coll. Top. and Gen. vi 108-122 relates (p. 115) that he was *chosen* Speaker 28 Jan. 1592-1593, that he was elected knight of the shire for Norfolk on 15 Feb. following, and was *elected* Speaker on 19 Feb.

[1] Thus Coke was Solicitor-General and Speaker in 1593, and Sir Edward Phelips, who was King's Serjeant, was Speaker from 1604-1611, Redlich, op. cit. ii 158.

[2] D'Ewes 128—in 1566 the Speaker told the House that the queen had commanded that there should be no further debate on the succession to the throne; see Strype, Annals of the Reformation iv 124 for some instructions for the Speaker's speech drawn up by Burleigh in Feb. 1592.

[3] It is clear that he was also "the mouth" of the House of Commons, D'Ewes 114—speech of Onslow 1566.

[4] Below 176. [5] D'Ewes 677 (1601).

[6] Their presence is mentioned in 1523, L. and P. iii *ii* no. 3024; the presence of the Secretary of State is mentioned in 1536, L. and P. xi no. 34, and that of the comptroller of the Household in 1539, L. and P. xiv *i* no. 1152; in 1540 Henry VIII. provided that the two secretaries he appointed should sit on alternate weeks in the House of Commons and the House of Lords, Tanner, Constitutional Documents 207; Elsynge, Manner of Holding Parliaments 171 (cited Redlich, op. cit. i 39 n. 1), is thus probably right in ascribing the introduction of privy councillors and king's servants into the House to Wolsey. Elizabeth in 1593 claimed that a position of superiority should be accorded to privy councillors who were members—"She misliketh" said the Lord Keeper, "that such irreverence was showed towards Privy Councillors, who were not to be accounted as common knights and burgesses of the House that are councillors but during Parliament; whereas the others are standing councillors, and for their wisdom and great service are called to the Council of the state," D'Ewes 466; but this claim was not conceded, Redlich, op. cit. i 49, 50.

[7] Ibid ii 91, 92; thus in 1566 they tried to stop a debate on a motion to ask the queen to settle the succession, D'Ewes 124; and in 1592-1593 they resisted a proposal to release members imprisoned by the queen, ibid 497.

[8] In 1548 the members for Coventry and Lynn made such determined opposition to an Act for vesting the lands of the guilds in the crown that, "siche of his Highnes Counsaile as were of the same Hous," feared that the whole Act would be rejected; they therefore bought off the opposition by a promise that the king would reconvey the lands to them, Dasent ii 193-195; cf. Porter's Case (1593) 1 Co. Rep. at p. 124b where it is said that provisoes in the Acts 23 Henry VIII. c. 4 and 1 Edward VI. c. 14 were inserted "rather to satisfy some burgesses in the Parliament, who were ignorant in the laws, than for any necessity."

clearly opposed.[1] Thus in 1571 the committal of Strickland gave rise to a debate upon this infringement of privilege. During a speech from Fleetwood in defence of the government, "the Council whispered together, and thereupon the Speaker moved that the House should make stay of any further consultation thereon."[2] And, when the Commons were beginning to assert claims to be the sole judges of their privileges and to resent outside interference, the fact that some privy councillors were also members of Parliament was found to be useful. They could do without offence in their capacity of members what they could not have done as councillors. Peter Wentworth in 1575-1576 was ready to give an explanation to the persons appointed to receive it, only when they demanded it in their capacity of "committees"[3] of the House, and not in their capacity of councillors.[4]

In these circumstances it is not surprising to find that, though Parliament was recognized as the legislative and taxing authority in the state, king and Council upon occasions took upon themselves to exercise both these functions.

Legislation. We have seen that by the latter part of the fifteenth century legislative acts which possessed the authority of Parliament were clearly distinct from legislative acts which did not possess this authority.[5] Statutes were quite distinct from ordinances or proclamations.[6] But though the king could not make a statute he had not lost all his legislative power. He still possessed the power to make ordinances or proclamations.[7]

[1] E.g. in the debate on Monopolies, D'Ewes 652-653—a course sometimes pursued to avert a defeat in the Courts, see Regnier v. Fogossa (1551) Plowden 20, 21.

[2] D'Ewes 176.

[3] In Elizabeth's reign the term "committee" means, not a body of persons, but a person to whom the consideration of some subject is committed, see Redlich, op. cit. ii 204 n. 1; this use of the term only survives in connection with the lunacy laws—we still speak of the committee of a lunatic; but the modern use of the term was beginning at the end of this century—in 1601 Mr. Fulk Grevil defined a committee as "an artificial body framed out of us who are the general body," D'Ewes 635.

[4] "If you ask me as Councillors to Her Majesty, you shall pardon me, I will make no answer; but if you ask me as Committees from the House, I will make you the best answer I can," D'Ewes 241.

[5] Vol. ii 439-440.

[6] For an exhaustive list of the Tudor Proclamations see Tudor and Stuart Proclamations, calendared by Robert Steele, vol. i. nos. 1-932; chaps. i and iii of the Introd. give full information as to the documentary history of proclamations, and as to their bibliography see ibid chap. vi and below 297-307 for a summary of the contents of some of the most important. It should be noted that a proclamation was originally, "an order under the great Seal to some official of the Crown commanding him to proclaim some fact or order," ibid p. xi; the proclamation, in the popular sense, was the schedule accompanying the order containing the words to be proclaimed; for specimens of these orders, which were in writ form, see ibid xii n.

[7] The term "proclamation" seems to have superseded the term "ordinance" in the fifteenth century; there does not seem to be any material difference between them.

In fact this subordinate legislative power was not peculiar to the king. It belonged to many of those older communities—manors, hundreds, boroughs, and even parishes—all of which in the Middle Ages performed various governmental functions.[1] The fact that Brook could class together cases relating to the by-laws of these communities and cases relating to royal proclamations,[2] is very significant of the effect which the rise of Parliament had had upon the king's once extensive power to legislate. It is clear proof that in this period the royal proclamation was regarded as being like a by-law in this essential respect that it was subordinate to the statute or the common law.[3] In fact it may be that royal proclamations were inferior to by-laws in respect of their permanence, for there is some authority which seems to show that royal proclamations were only in force during the life of the sovereign who issued them.[4] But though royal proclamations may have been comparable to by-laws in respect of their subordination to the statute or the common law, they were of vastly greater importance. The power to issue them was a prerogative jealously guarded. It was a grave offence for any subject to assume to exercise it, as Serjeant Knightly found when, being appointed executor, he attempted to anticipate a nineteenth century statute by issuing a proclamation that the creditors of his testator should send in their claims against the estate.[5] But the extent of the prerogative was by no means clearly ascertained.

Henry VIII. could generally induce his Parliaments to pass any legislative proposals which he deemed to be necessary; but his successors did not find their Parliaments quite so docile. It is not surprising therefore to find that at the latter part of this period a larger authority was claimed for royal proclamations.[6]

[1] Vol. ii 378, 391, 450; for the parish see below 151-163; for a case in which the validity of the by-law of a parish was upheld see Ab. *Proclamation* pl. 1 = Y.B. 44 Ed. III. Trin. pl. 13.

[2] Brook, Ab. *Proclamation* pl. 1 and 10.

[3] As Mr. Tanner has pointed out, a good illustration of the principle is to be found in the preamble to 7 Edward VI. c. 2 passed to confirm certain letters patent of Henry VIII. which had dissolved the statutory court of Augmentations and set up another, Constitutional Documents 336.

[4] In Tudor and Stuart Proclamations i no. 497 (1558) this seems to be admitted; cf. introd. xxxii. and Journals of the House of Commons i 481 (May 12, 1614), there cited; perhaps we can connect this with the mediæval idea that an ordinance was less permanent than a statute, vol. ii 438; it was certainly a view held as early as the eleventh century, ibid. n. 3.

[5] Brook, Ab. *Proclamation* pl. 1, "Nota in casu sir Ed. Knightly circa annum 20 Henrici octavi, il fuist punye pour feyser proclamation in Markette villes in nome le Roy, que les creditors de sir W. Spencer, a qui il fuit executor, venir eins par tiel jour de clayme lour dettes etc. quar nul poet faire proclamation nomine regis mes per authoritie le roye ou son counsel;" the same case is noted ibid pl. 10.

[6] Hawarde, Les Reports etc. 78 cited above 86 n. 10; cf. Bacon, Discourse upon the Commission of Bridewell, Works vii 511-512, "Do we not see daily in experience that whatsoever can be procured under the great seal of England is

In fact they trenched at times both upon the authority of Parliament and upon the liberty of the subject. Proclamations of martial law,[1] and proclamations forbidding building in or near London[2] are the best-known illustrations; and many others can be given. Thus in June, 1558, Mary issued a proclamation threatening to punish by martial law anyone found possessing treasonable or heretical books.[3] In 1581 Elizabeth, by the advice of her judges and Council, declared that an Act against usury, which had expired during a prorogation of Parliament, should be in force till the first session of the next Parliament, and forbade anyone to raise in any court of record the question whether or no the Act was in force.[4] In 1589 she ordered masters to re-engage all pressed soldiers who had been discharged, and threatened those who refused with proceedings in the Star Chamber.[5]

It is clear that many of these proclamations are illegal if we judge them by the rules of our modern constitutional law. But we cannot apply to the sixteenth century rules which were not clearly ascertained till the seventeenth century. In the sixteenth century the rules of the law on this subject were ill-defined.[6] This want of accurate definition was due mainly to two causes. In the first place the large vague powers of legislation possessed by the mediæval king had never been expressly defined or curtailed. Parliament, it is true, had become a partner with the king in the exercise of the legislative authority;[7] and, from the end of the thirteenth century, it was clear that a law which was made by the authority of Parliament could only be changed by the same authority; and that the same authority was needed for changes in the old established rules of the common law.[8] This involved in practice a limitation upon the king's power to legislate; but it was an indirect and therefore a vague limitation. In the second place, the growth of the modern state necessitated, in the interests of good government, a constant and minute regulation by the central authority of the activities both of the

taken *quasi sanctum*;" Hudson, Star Chamber 107, speaking of the punishment of the breach of proclamations before they had the authority of Parliament, says that, "this court hath stretched (them) as far as ever any Act of Parliament did."

[1] Dasent xviii 222-225, 236-238 (1589); xxv 330 (1596); xxxi 164 (1600); Tudor and Stuart Proclamations i nos. 668, 802, 805, 809, 818, 840, 873, 874, 899, 916.

[2] Dasent xiv 356 (1586-1587); xix 188, 278, 348 (1590); Tudor and Stuart proclamations i nos. 749, 927.

[3] Ibid no. 488; Coke, Second Instit. 63, mentions as illegal a proclamation of the same year (no. 484) forbidding the import of French wines; but, seeing that England and France were at war, its legality is unquestionable.

[4] Tudor and Stuart Proclamations i no. 758.

[5] Ibid no. 818.

[6] See L. and P. viii no 1042—a consultation with the judges on the subject.

[7] Vol. ii 440. [8] Ibid 308-309, 435-436; below 182, 185-187.

individual and of the various parts of the body politic; and this clearly necessitated an extensive use of royal proclamations. "When the common state or wealth of the people require it," it was said in the Star Chamber, "the king's proclamation bindes as a lawe and neede not staye a Parliamente."[1]

Thus the question of the authority possessed by proclamations was a matter which needed some definite settlement. On the one hand no one desired to give the king power to overturn by proclamation the existing machinery of law and government, and to alter radically the rights and duties of the subject. Bishop Gardiner, in a letter to the Protector Somerset,[2] relates that Cromwell once asked him in the presence of Henry VIII. whether the maxim *quod principi placuit* did not apply to the king of England, and that he had replied to this effect—"I had read indeed of kings that had their wills always received for a law, but I told him the form of his reign, to make the laws his will was more sure and quiet, and by this form of government ye be established, and it is agreeable with the nature of your people. If ye begin a new manner of policy, how it will frame no man can tell, and how this frameth ye can tell, and I would never advise your grace to leave a certain for an uncertain." It is probable that this fairly represented the average public opinion of the day; for we shall see that all the political writers of the period recognize the constitutional character of the English monarchy.[3] On the other hand, it was clearly necessary that the king's proclamations upon many matters should be obeyed. The existing law was obscure; and the inconvenience of this obscurity was not likely to be overlooked by a king who was remarkable for his political prescience. Henry VIII.'s statute of Proclamations[4] was an extremely able attempt by king and Parliament[5] to deal finally with the problem in a manner which should commend itself to the public opinion of the day.

The statute begins by stating clearly the nature of the problem to be solved. The king has issued many proclamations, "concerning divers and sundry articles of Christ's religion," and also "concerning the advancement of his commonwealth and the good quiet of his people;" but these proclamations have been disobeyed by those "who do not consider what a king by his royal power may do." Considering "that sudden causes and occasions

[1] Hawarde, Les Reportes etc. 328, 329.
[2] 1 S.T. 588.
[3] Below 208-214.
[4] 31 Henry VIII. c. 8; amended by 34 and 35 Henry VIII. c. 23; on the whole subject see E. R. Adair, E.H.R. xxxii 35-46.
[5] It was debated by Parliament for fifteen days, L. and P. xiv *i* no. 1158; the first bill sent down from the Lords was rejected by the Commons, who sent up another bill which, with some amendments, became law, E. R. Adair, E.H.R. xxxii 35.

fortune many times which do require speedy remedies, and that by abiding for a Parliament in the meantime might happen great prejudices to ensue to the realm; and weighing also that his Majesty (which by the kingly and regal power given him by God may do many things in such cases) should not be driven to extend the liberty and supremacy of his regal power and dignity by wilfulness of froward subjects;" it is enacted that the king with the advice of his Council, or the greater part of them, may issue proclamations which shall have the force of an Act of Parliament.[1] These proclamations are to be publicly proclaimed throughout the realm in manner provided by the Act.[2] Those who are accused of breaking them can be punished by certain members of the Council, sitting as a board, who are named in the Act.[3] Power is given to the king to direct the justices of the peace to see to the observance of such proclamations as he shall see fit.[4] It was not, however, intended to give the king and Council power to do anything they pleased by proclamation. The second section of the Act contains a clause amply safeguarding both the common law, existing Acts of Parliament, and rights of property, and prohibiting the penalty of death for the breach of a proclamation.[5] The safeguards with which the Act was accompanied, and the use which Henry made of it,[6] prevent us from seeing in it anything like a "lex regia." Rather it was an attempt to deal with a constitutional problem in a manner satisfactory to the king and the subject.[7] The king no doubt got his large power to legislate by proclamation recognized and put upon a firm basis: but his proclamations must have the consent of his Council; and the range of subjects with which they could deal was considerably limited.[8]

[1] 31 Henry VIII. c. 8 § 1. [2] § 3

[3] § 4; 34, 35 Henry VIII. c. 23; see Select Cases in the Star Chamber (S.S.) ii 225, 277 for two cases heard under this Act.

[4] 31 Henry VIII. c. 8 § 9.

[5] "Provided always that the words . . . of this Act be not understood . . . that by virtue of it any of the king's liege people, of what estate degree or condition so ever he or they be, bodies politic or corporate their heirs or successors, should have any of his or their inheritances . . . goods or chattels taken from them . . . nor by virtue of the said Act suffer any pains of death, other than shall be hereafter in this Act declared, nor that by any proclamation to be made by virtue of this Act, any Acts common laws standing at this present time in strength and force, nor yet any lawful or laudable customs of this Realm . . . shall be infringed."

[6] The list of Proclamations contained in vol. i of the Tudor and Stuart Proclamations bears this out, see below 296.

[7] Mr. Adair thinks, E.H.R. xxxii 41-46, that the real object of the Act was to provide a tribunal for the trial of the breach of proclamations, and not to settle any question as to their legal validity; and that it was repealed in 1547 because this tribunal failed to justify its existence; this view no doubt contains much truth; but I cannot help thinking that the framers of the statute wished also to settle a very doubtful question of constitutional law.

[8] Thus we find that one of the reasons for summoning Parliament in 1546 was that the king wanted Parliamentary sanction to the dispensation of certain Acts contrary to certain treaties he had made, L. and P. xxi *ii* no. 344.

The Act was repealed in the first year of the following reign;[1] and this meant that the king's power to legislate by proclamation again relapsed into its old obscurity. Proclamations were still very necessary. But though they were somewhat more extensively used by Henry's successors than by Henry himself, no large changes in the law were made by their means. The extent to which they could be legally used was never finally settled in this century, because the Tudors made so tactful a use of their powers that no demand for the settlement of this question was raised.[2] Here as in other branches of our public law the diplomatic obscurity which they courted was a serious stumbling block to their successors.

Taxation. Over matters fiscal the control of the crown and Council was far less extensive. Even Henry VIII. knew that he could not disregard the authority of Parliament in this department of government.[3] But though the crown and Council did not dare to impose any general tax upon the nation, they managed, indirectly, to assume considerable powers over the raising of money. We have seen that the Council gave directions as to the raising of contributions by the local authorities.[4] It sometimes seems to have been almost admitted by some that the crown could compel its more wealthy[5] subjects to contribute to benevolences or loans.[6] The amounts demanded from the persons selected to contribute were assessed just as if a regular tax had been imposed;[7] and the Council regularly summoned

[1] 1 Edward VI. c. 12 § 4.

[2] For some account of the contents of the Tudor Proclamations see below 297-307.

[3] See L. and P. iii *ii* no. 3024 for the debate in the Parliament of 1523; in 1545, alluding to the financial straits of the government, Wriothesley writes to Paget, "In the case of a Prorogation I see not how we shall live without some present help," L. and P. xx *ii* no. 272.

[4] Above 75, 78 n. 10.

[5] That only the more wealthy were to be asked to lend was specially provided in 1542, L. and P. xvii no. 194.

[6] Strype, Annals of the Reformation iii App. no. 58 cites a speech in Parliament in 1589, in which a member is reported as saying, "If it were a charge imposed upon us by Her Majesty's commandment, or a demand proceeding from Her Majesty by way of request . . . there is not one among us all either so disobedient a subject in regard of our duty, or so unthankful a man in respect of the benefits which by her we have received who would not . . . willingly submit himself thereunto . . . for it is continuously in the mouths of us all that our lands goods and houses are at the prince's disposing. And it agreeth very well with that position of the civil law which saith *quod omnia Regis sunt*;"—but this speech was made almost in a time of national emergency, just after the defeat of the Armada; a speech of Serjeant Heyle's in 1601 somewhat to this effect met with small favour in the House, D'Ewes 633. Such loans were sometimes justified on the ground that they saved the expense of a Parliament, L. and P. xx *i* no. 17; or that they did not grieve the commons, L. and P. xix no. 689—a view in which Parliament apparently acquiesced when it released the king from his debts, 21 Henry VIII. c. 24, 35 Henry VIII. c. 12; nor did the lenders really expect to see their money back, L. and P. xvii no 280.

[7] See e.g. L. and P. iii *ii* nos. 2483-2486.

before it those who refused to contribute,[1] and occasionally those who offered an inadequate sum.[2] It levied ship money in a national emergency, even from inland towns.[3] Nor was any objection made when, in pursuance of its powers to regulate foreign affairs and therefore foreign trade, it made readjustments of the customs revenue, which resulted in an increase of the duties payable.[4] When, in the following period, the absolute and exclusive control of Parliament over all taxation, direct and indirect, was maintained and enforced by mediæval precedents, these precedents of the Tudor period were used by the royalist lawyers with considerable effect.

Thus, although the Council did not desire to supersede Parliament, it exercised a large measure of control over its deliberations, and a large concurrent authority in the spheres of legislation and taxation. Partly by tact, partly by its own strength, it controlled Parliament almost as completely as it controlled the other organs of government.

When we examine these various activities of the Tudor Council, we can see that, here as abroad, the modern state was being created upon the basis of an extended and strengthened prerogative, working through newly created or newly organized central institutions. We can see that the Council, like the Councils of contemporary continental kings, was by far the strongest force in the state, that it was in constant and immediate relations with all other departments of government, and that it was the arbitrator between them. We can see that it was so reforming or remodelling the machinery of government that that machinery was able to perform the new duties and to undertake the new activities of the modern state. The result was that, here as abroad, the Council quietly assumed large powers to act as it pleased for the good of the state, and therefore necessarily encroached upon the provinces of other organs of government, and upon the rights and privileges of the

[1] Dasent i 167 (1545)—letters demanding the arrears of the benevolence; ii 457, 458 (1546-1547); vi 5, 198, and *passim* (1556-1558); vii 361, 388, 400 (1570); viii 4, 5, 6, 10, 19 (1571); xvii 133, 144, 201, 229, 264, 375 (1589); xviii 240 (1589); xx 112 (1590); xxviii 115, 132, 176, 255, 256, 257, 298, 352 (1597-1598); Hallam, C.H. i 244, 245; the speech cited from Strype, above 104 n. 6, bears this out—"There is none of us," says the speaker, "ignorant what numbers of Privy seals are even now dispersed through the whole realm to the emptying men's coffers, and impairing of their stocks; with what readiness, duty and good will these things have been and should be performed by the subjects no man here may doubt."

[2] L. and P. iii *i* no. 3230; xix *ii* no. 212 (the Bishop of Bath).

[3] Dasent xxv (1595-1596) 161 (New Sarum and Winchester), 212, 213 (inland towns in Suffolk); xxvi (1596) 6, 64 (Norwich), 146, 147 (inland towns in Somerset), 325-327 (inland towns in the West Riding of Yorkshire).

[4] Hall, Customs Revenue, i 122-144; Dasent vi 305, 337 (1558)—import duty on French goods, and export duty on beer; cf. ibid vii 102 (1559); see vol. vi c. 6 for the history and discussion of this question.

subject. Thus, in the sphere of local government, the control and criticism of the Council meant the substitution of the discretion of the central government for the discretion of the older officials and the older self-governing communities.[1] In the sphere of church government the large and vague powers of the ecclesiastical officials and courts were regulated by the royal supremacy, and thus brought under the control of the Council.[2] In the judicial sphere the Council claimed to hold the position of umpire between rival courts and clashing jurisdictions, and either to call before itself any case which appeared to affect the state, or, if it was heard by the ordinary courts, to give directions as to its hearing;[3] and this was in effect coming to mean that the Council, when it deemed it to be necessary for the safety of the state, could override the ordinary law.[4] Finally, it both controlled the business of Parliament and exercised a subordinate but concurrent legislative and taxing authority.[5]

Many of these activities, if we look at them from the point of view of the seventeenth century, can be roundly denounced as illegal and unconstitutional; and some of them were illegal and unconstitutional according to the better opinion of the sixteenth century.[6] But the Tudors on the whole used reasonably and honestly the powers which they had assumed; and, as I have said, in the sixteenth century, the importance of maintaining a state strong enough to repress religious faction and foreign invasion, and the obvious impossibility of maintaining such a state except upon the basis of royal power, outweighed in the minds of reasonable men the importance of a pedantic adherence to the letter of the law. Thus, if we take our stand in the sixteenth century, it might appear that the English state, like the continental state, was travelling along the road which led to centralized government founded upon royal absolutism and supported by a system of administrative law. This would be a conclusion which might easily be drawn by an intelligent foreigner, who looked at the English state simply from the point of view of the centralized machinery of the Council. It was, in fact, drawn by ambassadors at the court of Henry VIII.,[7] and by Bodin in the latter part of the sixteenth

[1] Above 72-73. [2] Above 81-83. [3] Above 84-87.
[4] Above 86. [5] Above 96-105.

[6] Thus in 1589 the Council laid it down that martial law could not be exercised, "where the quiet course of her Majestie's lawes maie be exercised," Dasent xviii 175; cf. on the same subject Camden, Annales s.a. 1573; similarly the wholesale fining or imprisonment of jurors for finding verdicts contrary to the evidence, though habitually practised, was condemned by many, including Sir Th. Smith, vol. i 343-344.

[7] L. and P. iv *iii* no. 6026 (1529), Chapuys told Henry VIII. that he thought that he was as "absolute as the Pope;" ibid xv no. 954 (1540), Marillac relates that the Estates had transferred their authority to Henry, whose "sole opinion henceforth was to have the force of an Act of Parliament;" and that he was treated "an idol to be worshipped."

century.[1] And, when we are reading the history of the seventeenth century, we shall do well to remember that it would be a conclusion especially easy to be drawn by a foreign king who had had little opportunity of looking at the English state from any other point of view. That such a conclusion would nevertheless be fundamentally erroneous we shall see when we have compared the relations existing between the old institutions and the new in continental states with the relations existing between them in England.

The Relation of the Old to the New Machinery of Government

In spite of foreign wars and internal disorders the fourteenth and fifteenth centuries were a period of legal and constitutional growth. In many countries in Western Europe the legal renaissance of the thirteenth century had helped forward the cause of legal development and orderly government by placing central courts, administering a more general and a better system of law, by the side of the old courts and the old customary rules. In France the Parlement of Paris became the general court of law for the royal domain; and, as happened in the case of the king's court in England, the increase in its business necessitated a division into distinct tribunals. Just as England got its Parliament in the last years of the thirteenth century, so France got its Estates General, and Spain got its Cortes. We shall see that the development of the common law in these centuries is paralleled on the continent by a development of Roman law, which took the form of an adaptation of its rules to meet the needs of the growing state.[2]

In all these countries this generalized law, these centralized courts, and these representative assemblies, were obliged to come to terms with the feudal baronage. The larger feudal principalities of France organized themselves after the fashion of the kingdom. They had their supreme courts, formed on the model of the Parlement of Paris, which in many cases became provincial Parlements when they were annexed to the royal domain. They had also their provincial estates.[3] The private jurisdictions of the smaller nobility still existed; and in spite of the constant encroachments of the central courts, and the growth of royal control over the manner in which justice was administered, they exercised, even in the sixteenth century, a considerable influence over local government.[4] Thus the new institutions of this century were

[1] La Republique Bk. i c. 8 p. 103.

[2] Below 220-228.

[3] Brissaud, op. cit. 879, 880.

[4] Esmein, op. cit. 469-471; for technical details as to the methods of the royal courts—*cas royaux*, *prevention*, and *appel*—see ibid 471-484; for the analogous process in England see vol. i 87-89.

everywhere obliged to contend with many competitors which represented older principles of government, and older legal ideas of many different dates. We can trace the resistance of the older order in two main directions—firstly in the local government, and secondly in the representative assemblies and the established central courts of law. Under these two heads I shall trace the history of the relation of the old to the new machinery of government on the continent and in England.

I. Local Government

I shall deal in the first place with local government, because the manner in which it was organized in the sixteenth century has affected the whole of the public law of the state from that day to this. We shall see that the continental organization was fundamentally different from the English; and that this difference goes far to account, not only for the unique position which the English Parliament and courts of common law obtained in this century, but also for the unique position of the English king and the unique character of the English state.

Throughout western Europe the local government was the stronghold of feudal ideas and tendencies; and the mastery of these ideas and tendencies was a condition precedent to the growth of a strong centralized government. The condition of England in the fifteenth century shows us that the mere establishment of centralized institutions was not enough.[1] So long as the noble houses retained any part of their old authority, they were a danger to the state. In France the revolt of the Duke of Bourbon in 1523,[2] and in Castile the revolt of the communeros in 1520-1521[3] are striking illustrations; while in Germany the clashing interests and the practical independence of the knights and the princes rendered futile all attempts at national union.[4]

Both in France and Spain the powers of the great nobles were gradually curtailed by the growing strength of the central government. They ceased to take any active share in the conduct of the state except as the servants of the crown; and only dignified titles, honourable and honorary offices, and social privileges, remained as memorials of their former state. The lesser nobles attached themselves to the court and made their careers in the king's service.[5] Even in Germany the days of true feudal independence were numbered. The princely houses consolidated their dominions, and developed into smaller or larger states.[6] As

[1] Vol. ii 414-416. [2] Camb. Mod. Hist. ii 46-55.
[3] Ibid i 372-374; Ranke, Turkish and Spanish Monarchies 56. [4] Above 8.
[5] Ranke, Turkish and Spanish Monarchies 57; Camb. Mod. Hist. i 397, 398.
[6] Above 18, 19.

we have seen, in some countries, and more especially in France, this process was delayed by the Reformation and the ensuing religious wars.[1] But it was not completely stopped: and, by the end of the century, it was clear that feudal principles had ceased to influence even the local government of the state.

A new system of local government had been gradually growing up in France in the course of the sixteenth century; and, like the French system of central government, it was imitated by many European states in this and the following century.[2] The main features of this new system were—(i) the conduct of the government by an official bureaucracy composed of the agents and servants of the Conseil du roi; (ii) the presence of a standing army upon which this official bureaucracy could in the last resort rely; and (iii) a consequent extension of the system of administrative law to all the activities of the local government.

(i) The growth of an official bureaucracy was gradual. Before the beginning of the sixteenth century the powers of the mediæval baillis and seneschals were, like the powers of the English sheriffs,[3] being sub-divided and entrusted to new officials. Their financial powers were handed over to receivers, their judicial powers to their lieutenants, and the growth of a standing army deprived them of their military powers.[4] But further control was needed; and this was found at first in the growth of the powers of the royal governors. They were originally military officers chosen from the nobility, generally for life. As representatives of the king their functions expanded at the expense of the older authorities, especially during the religious wars at the close of the century.[5] But they proved to be too independent for the centralized government of the seventeenth century;[6] and the intendants (appointed generally from the Masters of Requests[7]) first inspected, then acted as special commissioners, and finally supplanted all the other agents of the central government in the provinces.[8] The victory of 1661, which gave the Conseil du roi absolute control of the central government, gave the intendants supreme control over the local government.[9] The older offices survived; but they were merely honourable sinecures.[10] "All

[1] Above 19-20.
[2] Above 55 and n. 2.
[3] Vol. i 67-68.
[4] Brissaud, op. cit. 841, 842.
[5] Esmein, op. cit. 655-658.
[6] "En fait, les gouverneurs étaient à vie, et leur charge, après leur morte, passait le plus souvent à quel qu'un de leur fils. Aussi Loyseau voyait—il en eux le germe d'une nouvelle féodalité politique," ibid 657.
[7] Ibid 532.
[8] Brissaud, op. cit. 845, 846; Laferrière, op. cit. i 153, 154.
[9] Laferrière i 161 "Les arrêts de Conseil du 1661 affermissaient en même temps l'autorité des intendants."
[10] Esmein, op. cit. 654—"Dans le dernier état il y avait encore des sénéchaux et baillis d'épée, des gouverneurs, et des intendants;" thus in the seventeenth and

France," said Law, the financier to the Marquis d'Argenson, "is governed by thirty intendants."[1]

(ii) It was the presence of a standing army that enabled this highly centralized bureaucratic regime to be imposed upon the country. Machiavelli had said at the beginning of the century that good troops were as necessary to the well-being of a country as good laws;[2] and the truth of this dictum was recognized by all the continental states which were springing up in this century. In France the army dates from the reign of Charles VII., who established a body of cavalry in 1439, and a body of infantry in 1448.[3] The army was then needed both for national defence and for the maintenance of internal order. It was the necessities of national defence which were the most pressing when it was established; and these necessities were the plea put forward to justify the imposition of the permanent taxes needed to support it.[4] In the sixteenth century the king had acquired the right to levy these permanent taxes as he pleased.[5]

(iii) The establishment of this bureaucracy, dependent upon the Conseil du roi, consolidated the system of administrative law. The intendants were, in the seventeenth century, both the military and civil authorities. As civil authorities they not only controlled all matters of police and finance, they also possessed an extensive jurisdiction as administrative courts of first instance.[6] This jurisdiction came to be very wide. Besides other matters, it included all fiscal questions, public works and roads, the postal service, recruiting and balloting for military service, the relation of the troops to the civil authorities and the inhabitants, the affairs of municipalities and other communities, and police.[7] All these matters were removed from the ordinary judicial tribunals,

eighteenth centuries the office of bailli was coveted by the "chefs de la noblesse locale," Brissaud, op. cit. 842, while the office of governor was, "une des faveurs les plus recherchées par la haute noblesse," Esmein, op. cit. 658.

[1] Cited by De Tocqueville, Ancien Regime et la Revolution 54 "Sachez que ce royaume de France est gouverné par trente intendants. Vous n'avez ni parlément, ni états, ni gouverneurs; ce sont trente maîtres des requêtes commis aux provinces de qui dependent le malheur ou le bonheur de ces provinces, leur abondance ou leur stérilité."

[2] Il Principe cap. xii.

[3] Brissaud, op. cit. 963.

[4] Esmein, op. cit. 618.

[5] Below 167.

[6] Esmein, op. cit. 663-665.

[7] Laferrière, op. cit. i 169-178; it is pointed out, ibid 178, 179, that their jurisdiction extended to matters which at the present day would not be considered to affect administration—"on ne considérait alors, pour attribuer juridiction à l'autorité administrative, que le lien qui pouvait rattacher le litige a des intérêts généraux, l'influence que la decision pouvait avoir sur l'action et sur les moyens financiers de l'administration. On ne tenait pas compte d'autres principes que la législation moderne a reconnus, notamment de ceux qui consacrent la compétence exclusive de l'autorité judiciaire sur les fonctions de proprieté et de repression penale, ainsi que sur le contentieux des taxes indirectes de quel que nature qu'elles soient."

and handed over to the administrative courts of the intendants, from whom appeal lay only to the Conseil du roi.[1] This large jurisdiction was not acquired till after 1661. But it was in the sixteenth century that its foundations were laid in the constantly increasing control exercised by the Conseil du roi over the officials responsible for the conduct of the local government.

Thus on the continent the mediæval system of local government gave place to a highly centralized bureaucratic regime. With the disappearance of the mediæval system there disappeared also all those ideas of the supremacy of the law, and of local self-government which were inherent in it. The people at large had nothing to do with the government except to obey its orders. Criticism was not tolerated; and they gradually ceased to take an intelligent interest in its conduct. When the burden came to be too heavy the only resource was revolution.

The development of English local government in this century presents some analogies to that of the continent. There is the same growth of central control, and there are the germs of a system of administrative law. But it presents far greater contrasts. On the continent the progressive increase of this central control is the dominating note; and, by the end of the century, it is clear that the older officials are fast being superseded by the permanent agents of the central government. In England, on the other hand, there is no such progressive increase in the central control. The relative importance of some of the older officials is changed—some increase, and others decrease. But none are wholly superseded by the new officials and the new institutions of this century. On the contrary, the new is blended with the old in a manner which is quite unique. The result was a set of extraordinarily complex and unsystematic institutions. In them could be seen the political ideas and the legal rules of many different periods. The sheriff, the coroner, and the county and hundred courts, represented the communities, the communal officials, and the royal centralizing influences of the twelfth and thirteenth centuries. The manorial jurisdiction, the court leet, and other franchises, represented feudal ideas as modified by the royal and centralizing influences of the same period. The justices of the peace and the justices of Assize represented the further strengthening of royal control which was established over the local authorities in the fourteenth and fifteenth centuries. The new sphere allotted to the parish represented the new partnership between church and state which had been established by the

[1] Laferrière, op. cit. i 168, "Les attributions des intendants en matière contentieuse étaient en quelque sorte une délégation des pouvoirs du Conseil du roi; ils les exerçaient en premier ressort, et sous le contrôle supérieure du Conseil."

Reformation. The Lord-Lieutenants, and the active interference by the Council and its subordinate branches, represented the centralizing tendencies of this century.

An attempt to deal fully with this mass of institutions and officials would be out of place in a history of English law. But something must be said about the leading characteristics of the system of local government which resulted therefrom, because the shape which English public law took in the sixteenth and seventeenth centuries is largely due to them. In the sixteenth century they directly affected the position of the common law courts, and indirectly the position of Parliament. In the seventeenth century they helped to determine in some degree the form, and in a large degree the result, of the constitutional controversies with the Stuart kings. These characteristics can be best explained by looking at the various elements contained in the local government of this century in chronological order. But before discussing these various elements I shall say a few words as to the sources of our information. In this, as in other branches of the law, the literature of the subject gives us valuable sidelights upon the nature of the legal developments which were taking place.

At the end of the fifteenth century there were numerous short tracts circulating in manuscript which contained information as to various aspects of local government.[1] During the first half of the sixteenth century they were printed by many of the law publishers of the period.[2] Sometimes they were printed separately; but generally two or more were bound together in a single volume. The contents of these volumes will show us the kind of information which a book on the local government law of the earlier half of the sixteenth century might be expected to contain. Let us

[1] For the earlier literature on this subject see vol. ii 369-375.

[2] For lists of the tracts dealing with the Court Baron see The Court Baron (S.S.) 3-5; and for lists of those dealing with the Leet see Hearnshaw, Leet Jurisdiction in England 34-42; the list of books which I have examined is as follows: (1) Modus tenendi curiam baronis, Wynkyn de Worde (? 1510), containing the Boke of Justices of Peas, Antient precedents, modus tenendi curiam baronis cum visu francipledgii; (2) Modus tenendi curiam baronis cum visu francipledgii, R. Pynson (? 1516); (3) Modus tenendi curiam baronis cum visu francipledgii, R. Pynson (? 1520); (4) Modus tenendi curiam baronis, J. Rastell (? 1530); (5) An elaborate work published by R. W. Rastell in 1534, containing Natura Brevium, the old Tenures, Lyttleton Tenures, the New Talys, the articles on the New Talys, Diversity of Courts, Justices of Peace, the Chartulary, Court Baron, Court of hundred, Returna Brevium, the Ordnance of takyng fees in the Exchequer; the Preface indicates that the first three of these tracts are meant to contain the ABC of the law; the next two are useful "for those that use motyng," and the next is a sequel to them; the others deal with local government, and are useful both to the officials concerned and also to the lawyers, "as to them whom there ought nothing that anything pertaineth to the law to be unread, or unlearned, but fully and ripely knowen;" (6) the tracts published by Berthelet in 1544, and described below 113; for an account of some of the earlier tracts on the justices of the peace see below 115-116.

take as an instance a book published by Berthelet in 1544. Its contents, the title page tells us, are, "First the boke for a Justice of Peace. The boke that teacheth to kepe a court baron or a lete. The boke teaching to kepe a court hundred. The boke called returna brevium. The boke called Carta fœdi, containing the form of dedes, releasses, indentures, obligations, acquytannces, letters of atturney, letters of permutation, testamentes, and other thynges. And the boke of the ordinance to be observed by the officers of the kynges Exheker, for fees takying." Sometimes these books contain only two or three of these tracts;[1] but this is the typical collection.

On the whole it was a useful handbook. The first part is always the largest, and under it is grouped such information as to older officials, such as sheriffs, coroners, and constables, as related to local government law. The part dealing with the court baron and the court leet was useful to lawyers who then,[2] as in the days of Roger North, found court keeping instructive[3] and profitable;[4] and for their benefit much miscellaneous information bearing upon matters which might come before the court was given. We should note that the somewhat minute instructions which are given as to process and pleading show that the detailed rules of the common law upon these matters were, in theory, followed.[5] The part dealing with the hundred court was useful to those who advised lords who had this franchise; but it was meant more especially to serve the purposes of those whose business was in a borough which possessed it. All the books suppose that the hundred court in question is held at Colchester.[6]

[1] See above 112 n. 2.

[2] James Whitelock, the future judge (vol. v 343) was for a short time Steward of St. John's College, Oxford, and kept their courts, Liber Famelicus (C.S.) 15; in the preface to R. W. Rastell's book published in 1534 (above 112 n. 2) it is said that the rules contained in the tracts on the courts baron, leet, or hundred, "are daily looked on or at least daily followed in all such courts which be as who saith innumerable."

[3] Lives of the Norths (Jessopp's Ed.) iii 106-108—North points out that the holding of the court leet is a good introduction to the understanding of crown law, and "gives any student a handle to inform himself of the ancient constitution and nature of the English government and jurisdictions. The Copyhold court instructs him in titles . . . [The holding of] the Court Baron . . . wherein the process is after the model of the ancient common law . . . fits a man to be a practiser even at the Common Pleas bar."

[4] Ibid 108, "My brother recommended me to my Lord Grey of Werke for keeping of his courts at Epping by the Forest in Essex. This court was very considerable to me, for it was held on Thursday in Whitsun week every year. I went in the morning early, and returned at night with seven, eight, or nine pounds clear profit."

[5] Modus tenendi curiam baronis (Berthelet 1544), notes at the end on process and pleading; this was a characteristic of this court in the thirteenth century, vol. ii 398-399.

[6] Some of these cases are of a mercantile character—in the first case it is a merchant who is suing; there is a precedent of a certificate that one J.R. is a burgess and so free of toll throughout England, and of letters to Middleburg in Holland as to a debt due to burgesses.

The Returna Brevium was essential, because the whole of the local government was carried on under judicial forms, and by means of writs original or judicial; and the ordinance of the Exchequer was equally essential, because most of the officers of the local government were obliged to render an account at the Exchequer of fines, fees, and amercements.[1] The Carta fœdi has no direct connection with local government, but some of the forms contained in it, and some of the notes which occasionally accompany some of these forms, are connected with the side of the business of the court baron which was concerned with estate management; and it is for this reason that it was included in these collections. It was for a similar reason that books on surveying[2] were sometimes also included by the publishers as companion and supplemental tracts.[3]

The form which these books take tells us something of the general characteristics of the local government of this period. Clearly the justices of the peace are the most important officials. The tract treating of them is always the largest, and, because there were many new statutes to be added by succeeding writers, there is far more variation between the different copies. Though the form of this tract is, as we shall see, mediæval, yet it contains modern law. On the other hand, the books dealing with the court baron, the court leet, and the hundred court show hardly any variation at all. Probably they all come from a single mediæval manuscript.[4] The same thing can be said of the Returna Brevium; and, as the ordinance of the Exchequer comes from Henry VI.'s reign, it is necessarily identical in all cases.

As the century advanced, it became clear that local govern-

[1] Vol. ii 399.

[2] Fitzherbert's Tract, first published by Pynson in 1526 and re-published by Berthelet in 1539 is an example; it contains both legal and agricultural information, and is really a connecting-link between the law books which deal with the manorial courts, and the books upon rural economy; we have seen (vol. ii 322, 370) that Fleta's book contained information of this kind, borrowed from Walter of Henley; Fitzherbert also wrote a "Boke of Husbandrie," and his reading at Gray's Inn was on the "Extenta Manerii"—one of the statutes of uncertain date, vol. ii 222-223 and App. III.

[3] Thus Berthelet says at the beginning of Fitzherbert's tract, "When I had printed the boke longyng to a Justice of the Peace, together with other small bokes very necessary, I bethoughte upon this boke of Surveyenge, compyled sometyme by Master Fitzherbarde . . . how well it agreeth with the argument of other small bokes, as Court Baron, Court Hundred, and Chartulary, I went in hande and printed it in the same volume that the other be, to bynde them al together, and have amended it in many places."

[4] Hearnshaw, Leet Jurisdiction in England 34-36—as he says at p. 34 "the volumes, although some of them contain emphatic expressions of originality, are almost identical in form and substance with one another, and would all seem to be mere transcripts of one common source;" their early mediæval character is illustrated by the fact that we get, e.g. in the Modus Tenendi curiam baronis published by J. Rastell in 1530 (?), an enquiry into "a tenant giving lands in mortmain since the statute."

ment law could not be dealt with in these small books. Changes in the law demanded a new literary treatment. Thus we find that in the later books some of these tracts drop out. We do not hear much more of the manner of holding a hundred court. The hundred court with which these tracts had dealt was, as we have seen, in a borough;[1] and the borough franchises were so divergent that a single book could hardly be written about them. Moreover the officials of any given borough had all the information they wanted in the borough records.[2] The Carta fœdi disappears from the literature of local government—it never had much connection with it.[3] But some of the other tracts expanded into independent books; and, by the end of the century, these books group themselves mainly into two divisions. In the first place, there are the books dealing with the justices of the peace and the older officials of the county. In the second place there are the books dealing with the court baron and the court leet. In this second division the Returna Brevium was incorporated or retained as a useful appendix. We shall now see that the history of these two groups of books tells us something of the history of the law.

(1) *The books dealing with the justices of the peace and the older officials of the county.*

Anthony Fitzherbert, the author of the Grand Abridgment[4] and of the tracts on husbandry and surveying which I have just mentioned,[5] was perhaps also the author of the earliest tract on this subject. He was born in 1470, and became a member of Gray's Inn; but we do not know the date of his admission. He became serjeant-at-law in 1510, king's serjeant in 1516, a judge of the court of Common Pleas in 1521-1522. In 1524 he served on a commission sent to Ireland to attempt the pacification of that country, and in 1529 was one of the commissioners to hear causes in Chancery in place of Wolsey. He took an active part in Wolsey's impeachment, against whom he had a personal cause of quarrel—Wolsey had rebuked him because certain bills, complaining of extortion by the ordinaries, had been found before him. He sat on the commission which condemned the Carthusian monks for treason, and on that which condemned Fisher and More. He died in 1538.[6]

His tract on the justices of the peace was published anonymously in 1510; and from it many other similar tracts were

[1] Above 113. [2] Vol. ii 373-375.
[3] For later collections of precedents of this kind see vol. v 388-390.
[4] Vol. ii 544-545. [5] Above 114 n. 2.
[6] See Dict. Nat. Biog.; Foss, Judges v 167-169.

copied.[1] In 1538, the year of his death, he published under his own name another work on the same subject.[2] It is larger than the older tracts, but, as we might expect, it follows their form closely. It begins with an exposition of the justices' commission,[3] and goes on to set out the articles of the justices' charge to the jury. Having reached the point at which the jury are to enquire into the misdeeds of sheriffs and other officers of the county,[4] a long digression is made to explain the duties of these officials.[5] A return then is made to the articles of the charge[6]—those which depend on specific statutes are grouped separately, and those which are mentioned in the commission[7] are distinguished from those which are not mentioned,[8] A very much enlarged edition of Fitzherbert was issued by Crompton[9] in 1583.[10] He added to it a number of learned notes upon matters connected with the jurisdiction of the justices, as to the kinds of sessions at which the justices exercised this jurisdiction, and as to the powers of one, two, three, or more justices. He separated his account of the older officials of the county from his account of the justices.

Crompton's book shows us that the subject matter was outgrowing the traditional form of literary treatment. In the first place, it was no longer possible to group the law as to the justices of the peace round the charge which the justices gave to the jury at sessions. A more orderly treatment was needed for the guidance not only of lawyers, but also of those who, with little or no preliminary training in the law, were called on to perform the multifarious duties of the office. In the second place, the necessary information as to the older officials of the county demanded separate treatment. It is for this reason that, in the latter part of the century, we get a further sub-division of the literature on this subject. Books dealing with the justices of the peace fall into a class by themselves, and separate themselves from books dealing with the other officials of the county.

[1] In E.H.R. ix 305-310 Miss McArthur gives good reasons for her conjecture that this earliest anonymous tract is Fitzherbert's.

[2] Published by Redman under the title "L'office et auctoryte des Justyces de pees complyle et extrayte hors des auncient liures sibien del comen ley come dez estatuz oue moultes autres choses necessaires a scauoir nouelment imprime," E.H.R. ix 305; an English edition was published by Petyt in 1541; my references are to the 1538 Edition.

[3] ff. i-xixb. [4] f. xxiv.

[5] ff. xxiv-xliii; in the 1547 Ed. this digression is relegated to the end of the book.

[6] ff. liiib-lxxviii. [7] ff. lxxviiib-lxxxix.

[8] ff. lxxixb-clxx.

[9] Crompton was of Brasenose College, Oxford, and a reader and bencher of the Middle Temple; it is said that he refused to be made a serjeant that he might devote himself to literary pursuits; he died in 1599, Dict. Nat. Biog.; his chief work was a treatise on the Jurisdiction of Courts, as to this see below 212.

[10] It was reprinted 1584, 1593, 1594, 1606, and 1617.

(i) *Books on the Justices of the Peace.*

The want of an up-to-date and systematic treatise on this subject was supplied by that learned antiquary, lawyer, and justice, William Lambard.

Lambard was born in 1536.[1] His father was John Lambard, draper, alderman, and sheriff of the City of London. His mother was the daughter and heiress of William Horn of London; and if her family included among its ancestors that Andrew Horn, who was chamberlain of the City of London, historian, and possibly the author wholly or partially of the Mirror of Justices,[2] we may fairly suppose that Lambard got his taste for antiquarian and legal research from his mother's family. He was called to the bar by Lincoln's Inn in 1567,[3] and became a bencher of that Society in 1578-1579.[4] In the same year he was made justice of the peace for Kent. In 1592 he became a master in Chancery, in 1597 keeper of the Rolls and the House of the Rolls in Chancery Lane, and in 1601 keeper of the records in the Tower.[5] He died in 1601. He was an historian as well as a lawyer and an antiquary; and his history of the county of Kent is the first of our county histories. But it is his legal writings with which we are here concerned. These writings, which he christened with anglicized Greek names, were the Archaionomia, an edition of the Anglo-Saxon laws; the Archeion, an historical commentary on the central courts of justice in England; and the Eirenarcha, or treatise on the justices of the peace, to which he added a small tract on constables and other humbler officials of the county. All these books were important contributions to the legal literature of the day, and all are historically interesting. The Archaionomia, published in 1568, restored the forgotten Anglo-Saxon laws to the students of the common law. Because they had a direct bearing upon constitutional and legal antiquities, they could be pressed into the service of those who fought the battle of the constitution in the following century; and, as Lambard's Archeion shows,[6] they enabled pedigrees of our institutions and our laws to be traced back to an antiquity sufficiently remote and obscure to justify many ingenious deductions as to their rightful relations and proper sphere in the modern state.[7] The Archeion, completed in 1591 but not published till 1635, is an able historical summary of the position of the courts of common law, and of

[1] This account of Lambard's life has been taken chiefly from the Dict. Nat. Biog.

[2] Vol. ii 328-329.

[3] Black books of Lincoln's Inn i 356.

[4] Ibid 412.

[5] Monro, Acta Cancellaria 15.

[6] Archeion (Ed. 1635) 242-259 traces the Parliament back to Saxon times.

[7] The use which Hotman in his Franco-Gallia made of the early history of France is very similar.

those courts and councils which had so rapidly developed in this century. Its historical interest consists in the fact that it shows how hazy the relations of these new courts and councils were to each other and to the common law at the close of this period.[1] The Eirenarcha, published in 1581, and its companion tract upon the duties of constables and other officials dependent upon the justices, published in 1583, are the books with which we are at this point most directly concerned. They were the most practically useful of all Lambard's books, and by far the most popular;[2] for they exactly supplied a want which had long been felt by that numerous and important class who were called on either to act as justices of the peace, or to advise them as to their powers and duties.

In his preface Lambard tells us that he had set himself to compare the older treatises on the justice of the peace "with the book cases and statutes that have arisen of later times, and out of them to collect some one body of discourse, that may serve for the present age wherein we now live, and somewhat further the good endeavour of such gentlemen as be not trained up in continued study of the law."[3] He was entirely successful in his object. His book was both clearly arranged and comprehensive in its scope. The older books had contained somewhat formless catalogues of powers and duties. Lambard adopted a new principle of arrangement adapted to the dimensions which the subject had now assumed. He divided the whole treatise into four books. Book I. gives a general view of the office of justice—"shewing what it is, when it began, how it is endowed, by what means it is maintained, and after what sort it may be determined."[4] Book II. details the cases with which a single justice can deal out of sessions; and it is followed by a table in which his powers are summarized. Book III. details the cases with which more than one justice can deal out of sessions. Book IV. deals with the sessions of the peace. The first eighteen chapters deal with matters common to all sessions; Chapter XIX. deals with general or quarter sessions;[5] and Chapter XX. with the special sessions. A reference to the Appendix in which the contents of these four Books are given will show the fulness with which each of these subjects is treated.[6] At the end of the work there are Appendices

[1] Below 273-275; vol. v 214.

[2] Between 1583 and 1610 there were seven editions of the Eirenarcha, Dict. Nat. Biog.; Blackstone, Comm. (1st Ed.) i 343 could still recommend it to students; the companion tract was reprinted six times between 1584 and 1610. I have used the 1619 edition.

[3] Proem.

[4] Bk. II. c. 1.

[5] This Book shows that the classification of the various kinds of sessions is still somewhat hazy.

[6] App. I. (i).

giving a table of statutes affecting justices of the peace, and sundry precedents of presentments, of indictments both in lay and ecclesiastical courts, and of processes upon these indictments.

Lambard's Eirenarcha, with its supplementary tract upon the duties of constables, thus gives an account, which is both complete and systematic, of the organization of the local government under the justices of the peace, as it stood at the end of the sixteenth century. It is for this reason that it must be placed at the head of that long list of books upon the justices of the peace which stretch in a continuous series from the seventeenth to the twentieth century.[1] It was in these books dealing alphabetically[2] (for no other arrangement was possible) with the practice of the Sessions, that the greater part of local government law was for many centuries to be found. They deal only with the theoretical side of the subject—simply stating the law upon the matters coming before the justices, and directing the justices how they ought to deal with them. If we wish to know the manner in which this scheme of local government actually worked at different periods, we must go below their surface, and look at the actual records of the Sessions. Some few of these records are beginning to get into print; and we shall see that some study of them is essential if we would understand the social and political conditions for which the legislators and judges and writers of the sixteenth and seventeenth centuries made and applied and systematized the law.

(ii) *Books dealing with other Officials of the County.*

These books are of far less importance than the books upon the justices of the peace. Fitzherbert's tract[3] was reprinted by Crompton; but we get no other book in the sixteenth century. At the beginning of the following century, Dalton[4] published his book on the sheriff; and, in spite of a growing number of rivals, it continued to be a standard authority till the beginning of the eighteenth century. Lambard had written a tract about constables and other minor officials dependent on the justices;[5]

[1] For a list of some of the more important of these books see Webb, Local Government, the Parish and the County 295 n. 1; Burn's work is one of the most important; there were thirty editions between 1755 and 1869.

[2] Dalton's Country Justice, first published in 1618, was perhaps the first book to adopt this arrangement for that part of the book dealing with the powers of the justices; new editions appeared till 1742; it deals with the practice of the justices out of sessions, and was designed to assist those who were obliged to act without expert advice; E. Wingate—a mathematical as well as a legal writer—published in 1664 "The whole office of a county justice of the peace."

[3] Above 116.

[4] The Office and Authoritie of Sherifes; First Ed. 1623, abridged by the author in 1628; it was re-issued last in 1700. Dalton had a chamber in Lincoln's Inn, and dedicated his book on the justice of the peace to the Benchers of that Society, but it does not appear that he was ever a member.

[5] Above 117.

but he had said nothing as to church-ministers, church-wardens, overseers of the poor, and surveyors of highways. It was not till the following century that the growing organization of the parish for poor relief and for other civil purposes gave rise to a literature upon its activities, which came in time to share the field of local government law with the literature upon the activities of the justices of the peace.[1]

(2) *Books dealing with the Court Baron and the Court Leet.*

There was still a considerable amount of work to be done by these courts. The common field system of agriculture needed regulation; the rights and duties of copy-holders were matters for the manorial court to determine, subject to the control of the courts of common law; and statutes of this period had assigned new duties to the leet. Thus a want was felt for something more than the single stereotyped tract which various publishers went on issuing from the press during the first half of this century.

This want was supplied by John Kitchin, a double reader and Treasurer of Gray's Inn.[2] His book[3] was, as he says in his dedicatory preface to the students of the Inns of Chancery, designed in the first place to instruct those who held these courts; and in the second place, to induce lords of manors to appoint as their seneschals and bailiffs men learned in the law, and not merely serving men, who administered, not the law, but what they considered to be their lord's pleasure. It begins with a preamble in which he discusses the cause for which the king and the law were ordained of God, the antiquity of these courts, and the origin of the manor.[4] It then deals firstly with the mode of holding the court leet,[5] and secondly with the holding of the court baron.[6] In both cases the charge to the jury is the text, and numerous and detailed notes form a commentary on it: and in both cases the articles of the charge are far more numerous than in the earlier tracts.[7] In the charge to the leet jurors a classification is made into offences enquirable and presentable, and offences which are enquirable, presentable, and punishable;

[1] For the Parish see below 151-163.

[2] He was admitted in 1544, called in 1547, became an ancient in 1557, was Summer Reader in 1563, Double Reader in 1571-1572, Treasurer in 1575, Dean of Chapel in 1580—though in a state paper of 1577 he was said to have been a papist; his book was published in 1580, see Pension's Book of Gray's Inn 4 n. 1, 9, 21, 492; his name is spelt variously—Kytchin, Kytchine, and Kitchin.

[3] The full title is, "Le Court Leet et Court Baron collect per John Kitchin de Graies Inn un apprentice en Lez et les cases et matters necessaires pur Seneschals de ceux Courts a scier et pur les students de les measons de Chauncerie."

[4] ff. 1-6. [5] ff. 6-53. [6] ff. 53b-214.

[7] The charge to the Leet and the matters enquirable and presentable are contained in thirty articles, and the matters enquirable, presentable, and punishable in forty-five: the charge to the Court Baron contains forty articles.

while new matters which had been added by the statutes of this period are placed in a third division in which they are arranged alphabetically according to subject.[1] There is no classification of this kind in the charge at the court baron. The notes on this charge are elaborate and fortified with abundant citations of authorities, chiefly from the Year Books, but also from other sources. At the end of the part of the book dealing with the leet there are a collection of forms of presentments in the leet; and at the end of the part of the book dealing with the court baron there are notes for pleaders, a specimen of a court roll, and precedents of pleading.[2] As in the older tracts, so in this work, a treatise on the proper modes of returning writs comes at the end.[3] This also has been enlarged, and to it have been added illustrative cases.

Towards the end of the century English books on this subject began to appear; and in 1605 Kitchin's book was translated.[4] Many similar books were published in the course of the seventeenth and eighteenth centuries, the longest lived of which was the Court Keeper's Guide of William Shepherd, first published in 1641, and re-issued as late as 1791.[5] But towards the end of the eighteenth and at the beginning of the nineteenth centuries the leet was decadent, and the common field system was decaying. The chief business of the manorial court was copyhold conveyancing business; and thus these books naturally developed into the treatises on copyholds with which the modern lawyer is familiar.[6]

The two representative books of the end of this century are the books of Lambard and Kitchin. They illustrate what I have said above as to the variegated character of English local government. They show us that its institutions have come from all periods of English history, and that they have introduced legal ideas taken from all these periods. We cannot therefore hope to understand the legal ideas underlying the local government of the sixteenth century, unless we analyse chronologically the contributions which these different periods have made to it.

Chronologically the history of local government falls into the following three periods: the earlier mediæval period, the later mediæval period, and the sixteenth century. I must briefly describe the earlier periods in order that we may understand the form which the local government assumed in the sixteenth century.

[1] ff. 17b-21. [2] ff. 214-255. [3] ff. 255-289b.
[4] Hearnshaw, op. cit. 38. [5] Ibid 39.
[6] For the details in the evolution of this literature see ibid 39-42.

The Earlier Mediæval Period.

From the earlier mediæval period come certain communal, certain feudal, and certain franchise courts and officials, which still formed a considerable part of the local government of the sixteenth century. I shall deal with them under these three heads.

(i) The communal courts and officials.

The communal courts of county and hundred, and the sheriff's tourn, had come to be of very small importance.[1] The books of the period dealing with local courts and local government do not deal specifically with them; and in the books dealing specifically with the jurisdiction of courts they occupy a very small space.[2] The infrequency with which they are mentioned in the statutes of this period shows that they had ceased to form an active part of the judicial and administrative organization of the state.[3]

Both the standard treatises on local government which were printed in this century, and the statutes, show that it was otherwise with some of the officials of these courts. The office of sheriff[4] had declined from its former magnificence. But it had secured a permanent place in the local government. The sheriff was the official entrusted with the execution of all the royal writs. He had therefore become the agent to set in motion the complicated process of all the royal courts, criminal and civil, central and local. Seeing that the activities of the local government were still mainly carried on under judicial forms,[5] his duties in connection with it were still of considerable importance. The office of coroner[6] was still useful. His chief duty had, as we have seen, already become that of holding inquests in case of unexplained death. The procedure at such inquests was improved by a statute of 1555, and was a useful aid to the detection and punishment of crime.[7]

The only other officials of this period whose importance had been permanent were the Constables.[8] They were of two varieties

[1] Vol. i 69-82; Webb, Local Government, the Parish and the County 290, 291.

[2] Coke, Fourth Instit., twelve pages; Crompton, Jurisdiction of Courts, three pages.

[3] The references to the tourn in the statute book of the period are scanty; they are, 24 Henry VIII. c. 10 (killing crows), 24 Henry VIII. c. 13 (apparel), 7 Edward VI. c. 5 (price of wine), 13 Elizabeth c. 19 (woollen caps), 21 James I. c. 21 (horse bread); the leet was a far more flourishing institution, and we shall see that the statutes of the period assigned many new duties to it, below 129.

[4] Vol. i 65-69; Smith, Commonwealth Bk. ii c. 14; Fitzherbert, Justice of the Peace (Ed. 1547) cxxii-clviii; Crompton, Justice of the Peace.

[5] Below 143-144.

[6] Vol. i 82-86; Smith, op. cit. Bk. ii. c. 21; Fitzherbert, op. cit. clxxix-clxxxviii; Crompton, Justice of the Peace.

[7] Vol. i 84-85; 1, 2 Philip and Mary c. 13 § 5.

[8] Fitzherbert, Justice of The Peace clxx-clxxviiib; F. Bacon, The Office of Constables, Works (Ed. Spedding) vii 745-754; Lambard, The Duties of Constables;

—the high constables, who represented and acted as the executive agents of the hundred, and the petty constables, who represented and acted as the executive agents of the township. In their developed form they may have absorbed older officials of the hundred or the township—certainly petty constables had in the sixteenth century absorbed the offices of head-borows, borsholders, or tithing men who represented the township or tithing.[1] The first mention which we have of them *eo nomine* is in a writ of 1252.[2] By that writ they were entrusted with the duty of seeing to the due observance of the Assize of Arms, and of all other matters pertaining to the conservation of the peace; and these duties were enforced and expanded by statutes of the fourteenth and fifteenth centuries.[3]

These constables may originally have been the nominees of the hundred court or of the tourn or leet or township, and they certainly represented and acted as the executive agents of the hundred and the township. But, by the end of the sixteenth century, both the manner of their appointment and their legal position had changed. First with regard to the manner of their appointment: The high constable was usually appointed [4] and removed [5] by quarter sessions. The petty constable was appointed by the tourn or leet; [6] and when first the tourn and then the leet decayed,[7] they came to be appointed by the quarter or petty

E. Wingate, The Exact Constable; J. Ritson, The Office of Constable; Webb, Local Government, the Parish and County 25-29, 291-292; H. B. Simpson, The Office of Constable, E.H.R. x 625-641; C. J. Cox, Three Centuries of Derbyshire Annals i 95-103 (High Constables), 104-113 (Petty Constables).

[1] Lambard, Office of Constables etc. 6-9; Eirenarcha (Ed. 1602) Bk. i c. 3; Webb, op. cit. 27 n. 1; they are identified in the statute 32 Henry VIII. c. 13.

[2] Stubbs, Sel. Ch. 372, "In singulis . . . villatis . . . constituantur unus constabularius vel duo secundum numerum inhabitantium et provisionem prædictorum; in singulis vero hundredis constituatur unus capitalis constabularius, ad cujus mandatum omnes jurati ad arma de hundredis suis conveniant, et ei sint intendentes ad faciendum ea quæ spectant ad conservationem pacis nostræ;" as Ritson points out, op. cit. xviii, it is hardly possible, in the face of this writ, to contend with Coke and Hale that the constable originated with the statute of Winchester; whether or no they existed before this writ and were *conservatores pacis* at common law, the first mention of them *eo nomine* is in 1252; it may be that the name only was new, and that at any rate the petty constable represented the reeve or tithing man, E.H.R. x 671; Coke, Fourth Instit. 265; Lambard, Office of Constables 6-10; on this view the effect of the writ of 1252 on the petty constable was somewhat similar in its effect to the Capitula Itineris of 1194 on the coroner, vol. i 82-83; Bacon, op. cit. (Works Ed. Spedding) vii 749 considers that the high constable is of later origin than the petty constable, and that probably he was newly created in 1252.

[3] 13 Edward I. stat. 2; 2 Edward III. cc. 3 and 7; 4 Edward III. c. 10; 9 Edward III. c. 14; 23 Edward III. c. 1; 25 Edward III. stat. 1; 36 Edward III. c. 2; 12 Richard II. c. 3; 11 Henry IV. c. 4; for these statutes see E.H.R. x 633-637.

[4] Bacon, op. cit. (Works Ed. Spedding) vii 749.

[5] Lambard, Office of Constables 19.

[6] Coke, Fourth Institute 265; for these courts see vol. i 76-82, 134-137. In 1518 it was stated, in an answer to a bill in the Star Chamber, that at Peterborough the custom was for the outgoing constables to nominate their successors, Select Cases in the Star Chamber (S.S.) ii 127, 128; and constables and overseers were often appointed in this way in the eighteenth century, Webb, op. cit. 46, 62.

[7] Vol. i 81, 137.

sessions,[1] often, at any rate in later days, on the nomination of the parish vestry, which had filled the place left vacant by the decay of the old communities.[2] Secondly, with regard to their legal position: Under the old law they were the executive agents of the hundred or township; and just as the hundred or township were separate communities with separate spheres of action, so the high and petty constables were separate classes of officials each having their own sphere of action.[3] With the decay of the older communities of hundred and township, and the growth of the civil functions of the parish, they come to be regarded, not as the executive agents of these communities, but as the executive agents of the justices of the peace,[4] and as the representatives, and in some sort the masters, of the hundred, township, or parish;[5] while the petty constable of the parish became definitely subordinate to the high constable of the hundred.[6] Thus the justices, even in Elizabeth's reign, were beginning to act rather on the presentment or information of the constables than upon a presentment of a jury of the hundred;[7] the constables were expected to act on their own initiative when a speedy remedy was required;[8] and the statutes of this century,

[1] In "The Justice of the Peace," published by Berthelet 1544, at pp. 49, 49b, there is a writ, tested by the justice of the peace, to the sheriff and a constable of a hundred to choose a petty constable; 13, 14 Charles II. c 12 provides that where the leet is not held two justices in petty or quarter sessions shall appoint; cf. Ritson, op. cit. xxviii; Webb, Local Government, Manor and Borough 117, 122, 123.

[2] Below 158.

[3] Bacon, op. cit. 754, "their authority is the same in substance, differing only in the extent; the petty constables serving for only one town, parish or borough; the head constable for the whole hundred; nor is the petty constable subordinate to the head constable for any commandment that proceeds from his own authority."

[4] Ibid 751-752; Smith, Commonwealth Bk. ii c. 22; Webb, The Parish and County 27, 28.

[5] Selden, Table Talk no. cii, "the parish makes the constable, and when the constable is made he governs the parish."

[6] Bacon, op. cit. 754, "it is used that the precepts of the justices be delivered unto the high constables, who being few in number may better attend the justices, and then the head constables, by virtue thereof, make their precepts over to the petty constables;" Ritson, op. cit. xxvii.

[7] Webb, Parish and County 463-473; Bacon, op. cit. 750 says that the presenting jury was "chiefly to take light from the constables of all matters of disturbance and nuisance of the people;" in fact as early as 1349-1359 constables made presentments to the justices of labourers, B. H. Putman, Enforcement of the Statutes of Labourers 67, 68; in 1600 we have a series of eighteen articles drawn up by Coke as to the matters to which the constables of the hundred must answer at the beginning of every assize, State Papers Dom. Eliz. (1598-1601) cclxxvi 72; Lambard, Eirenarcha 395 says that the constables of the hundreds must be present to serve as jurors, and at p. 397, that the general jury for the shire was in Kent generally made up of the constables only; in fact, when the communal courts gave place to the justices, the constables to a large extent acted as a jury to the sessions of the justices; below 144.

[8] "But because leets are kept but twice in one year, and many of those things require present and speedy remedy, the constable in things notorious and of vulgar nature, ought to forbid and repress them in the mean time; if not, they are for their contempt to be fined or imprisoned or both by the justices in their sessions," Bacon, op. cit. 753.

which imposed many miscellaneous duties upon them in connection with the poor law and other matters, tended to increase their personal importance.[1]

Thus the constables of the sixteenth century really acted in a threefold capacity—as servants of the justices, as representatives of the hundred township or parish, and as persons directly entrusted with the execution of specific statutory duties. It was only in places where the existence of a franchise kept the hundred court alive that the petty constable continued to be the appointee and the servant of the hundred.[2]

Just as in the county the sheriff and the coroners were the officials who connected the older mediæval forms of local government, based on the shire and hundred courts, with the later mediæval form of local government based upon the justices of the peace; so in the hundred and township the constables were the officials through whom these mediæval communities were connected with the new civil functions of that old ecclesiastical community—the parish; and it was through them that the activities of this new civil unit were linked up and subordinated to the organized rule of the justices of the peace. The reason why the more important officials of this early mediæval period thus usurped the place of the old communal courts, whose agents or presidents they had once been, is not far to seek. It was far easier to strip the communal officials of their archaic traits than the communal courts, and to adapt the functions of their officials to the needs of the new centralized institutions which were creating a common law. It is because their functions could be and were thus adapted that they themselves were, during the sixteenth century, gradually and silently transformed into officials of a modern state.

(ii) The feudal element.

All danger that England would be split up into feudal principalities of the continental type was over by the end of the thirteenth century. But we have seen that a more dangerous form of feudalism of a new type had arisen in the fifteenth century, and that this new feudalism, helped by dynastic feuds and a weak executive, had paralysed the government.[3] Feudalism of this type was firmly suppressed by the Tudors.[4] They

[1] Lambard, Office of Constables 23 seqq.; see e.g. 19 Henry VII. c. 12; 22 Henry VIII. c. 12; 27 Henry VIII. c. 25; 1 Edward VI. c. 3; 3, 4 Edward VI. c. 16; 14 Elizabeth c. 5; 27 Elizabeth c. 13; 39 Elizabeth c. 4; for some later statutes dealing with "ale houses, vagrancy, and parish meetings" see Webb, Parish and County 26 n. 2; it is probably such duties as these that led to the holding by the high constables of the Petty or "Statute" sessions which are mentioned in 5 Elizabeth c. 4 § 40; see Webb, op. cit. 292, 491-493; below 147 n. 1.

[2] Above 123 n. 6; below 128.

[3] Vol. ii 414-418.

[4] Above 27, 33 n. 2, 39, 47.

completely mastered the great nobility. The House of Lords, whether acting as a branch of the legislature[1] or as a criminal court,[2] rarely dared to oppose the wishes of the king; and the individual members of the nobility were eager to make a show at the royal court, and to serve the king in any capacity which might be assigned to them.[3] Though in England, as elsewhere, religious dissension led to a recrudescence of feudal disorder,[4] the suppression of this disorder by Henry VIII. and Elizabeth[5] destroyed for ever the power of the feudal lords to imperil the safety of the state, and reduced to very small dimensions the political influence of feudalism.[6] As we have seen, the purely feudal jurisdiction was confined within the narrow limits of the manor.[7] The manorial jurisdiction was occupied chiefly with questions of estate management, and questions arising out of the communal system of agriculture still prevailing in many parts of England,[8] and sometimes with small personal actions.[9] It had little to do with local government, unless, as was sometimes the case, the lord of the manor possessed in addition a franchise jurisdiction. To these franchise jurisdictions we must now turn.

[1] Above 92-93.

[2] The only State Trial of this period in which the House of Lords acquitted was that of Lord Dacre of the South in 1534, L. and P. vii *xlii-xliv*; Chapuys, ibid no. 1013 said that the acquittal was "one of the most novel things that have been heard of for 100 years;" but the accused in spite of his acquittal did not get off scot free; Chapuys, loc. cit. p. 389 says that "he was shut up as much as ever," and a bond which he had given for the fulfilment of certain promises made by him when he confessed to the concealment of certain letters, was made the means of further persecution, ibid no. 1270; it is not surprising that convictions should be the rule if it was the custom to consult on the fate of a prisoner before he was tried, see an account of such a discussion in 1540, L. and P. xv no. 932.

[3] In a critical account of Wolsey's doings of the year 1529, L. and P. iv *iii* no. 5750, it is said, at p. 2562, that he "had employed the noblemen of the realm" in the examination of mis-governed persons; it is also pointed out ibid at pp. 2560-2561 that the nobility had been impoverished by Henry's wars and the extravagance of his court.

[4] Above 39, 47.

[5] Ibid.

[6] This is very well put in a tract by Sir W. Raleigh called "the prerogative of Parliament, proved in a dialogue between a Councillor of State and a Justice of the Peace" (Ed. 1640) p. 27—"To say the truth, my lord, the Justices of the Peace in England, have opposed the injusticers of warre in England, the king's writ runs over all, and the great Seale of England with that of the next constables will serve the turne to affront the greatest Lords in England that shall move against the king. The force therefore by which our Kings in former times were troubled is vanished away;" but that feudal ideas were a real danger in the North right down to the suppression of the rebellion of the northern earls may be seen from the history of that rising, and from a recommendation in S.P. Dom. Add. (1571) 348 that the tenants be given a secure tenant right so that they may not be so entirely under the control of their lords.

[7] Vol. i 179-187.

[8] Vol. ii 56-61.

[9] Vol. i 184; by the end of this century the jurisdiction was shrinking, but probably a good many petty cases were still heard; information as to the conduct of these cases is given in the tracts of this period dealing with manorial and leet jurisdiction, above 113, 120-121; in a few places they were still active at the beginning of the nineteenth century, Webb, Local Government, The Manor and Borough 119 n. 4.

(iii) The franchises.

We have seen that, throughout the Middle Ages, the Counties Palatine and certain large liberties had been allowed to exist. Though some of these Counties Palatine and liberties retained an independent existence right down to modern times, it was during this period that their internal organization, judicial and administrative, was assimilated to that of the rest of the country, and that the justice administered in their courts was declared to be administered in the king's name.[1] It is significant that the only franchise, except the smaller franchises with which I shall deal immediately, which was sufficiently important to be made the subject of a separate treatise, was the Forest jurisdiction. John Manwood, of Lincoln's Inn, Keeper of Waltham forest and justice of the New Forest, wrote a book on the Forest Laws which at once became classical.[2]

Some of the smaller franchise jurisdictions, however, still maintained an independent existence, and occupied a certain sphere in the local government of this period.[3] Of the space which they occupied and of the influence which they exercised I must say a few words. I shall deal in the first place with the country at large, and in the second place with the boroughs.

The Country at Large.

The franchise which was the commonest, and of the most importance from the point of view of local government, was that which conferred a leet jurisdiction.[4] Courts leet survived when the communal courts decayed because, being franchises, they were regarded as private property. If the king chose to govern the country through the justices of the peace rather than through the county court and the sheriff's tourn, there was nothing to prevent him from doing so. But in the case of the franchise

[1] 27 Henry VIII. cc. 24 and 26; 34, 35 Henry VIII. c. 26; vol. i 112, 115, 123-125; for a more detailed account of the assimilation of the Counties Palatine and some other liberties into the regular scheme of local government see Webb, Local Government, the Parish and the County 313-318.

[2] "A treatise and discourse of the Lawes of the Forrest; wherein is declared not onely those lawes as they are now in force, but also the originall and the begining of Forrestes: and what a Forrest is in his own proper nature, and wherein the same doth differ from a Chase, a Park, or a Warren, with all such things as are incident or belonging thereunto with their severall proper tearms of art. . . . Also a treatise of the Purallee;" the book was privately printed in 1592; the first edition enlarged was published in 1598; other editions 1599, 1615, 1665, 1717, 1741; it was abridged in 1696; for the Forest jurisdiction see vol. i 94-107.

[3] They were not affected to any appreciable extent by the act of 27 Henry VIII. c. 24; the only sections which would seem to apply are § 6—the officers of liberties must attend upon the justices; § 8—the king is entitled to the fines imposed on the officers of liberties who have failed in their duty; and § 12—the statutes rendering the sheriffs liable for various misdeeds are to apply to the officers of liberties.

[4] Vol. i 134-137; on the whole subject of Leet Jurisdiction in England see Professor F. J. C. Hearnshaw's valuable book.

jurisdiction there was the pecuniary interest of the lord to be considered; and just as the civil jurisdiction of the manorial courts and hundred courts in private hands remained active for a much longer period than the civil jurisdiction of the communal courts, so the leet jurisdiction got a further lease of life during this period.[1] From the thirteenth century onwards its proceedings had, like the proceedings of other courts and officials, been regularized and standardized by the courts of common law.[2] During this period its doings were supervized by the Star Chamber;[3] and it was recognized by the legislature as a useful and integral part of the government of the country.[4]

We have seen that many of the manuals which, from the thirteenth century onwards, had been written as guides for the Stewards of manors, found their way into print in the first half of this century.[5] Their form and substance is, as we might expect, essentially mediæval. The court is the old undifferentiated court—in none of them is there any clear distinction between court leet and court baron, far less between court baron and court customary;[6] and its procedure is the procedure of the thirteenth century. This will clearly appear if we look for a moment at a day in court as outlined in these books.

The proceedings begin by the issue of a precept by the seneschal to the bailiffs to summon the court. When the court meets it is opened with a single "Oyez" if it is a court baron only; with a triple "Oyez" if it is a leet day. Essoins are then taken, and if it is a leet day the twelve jurors are called; and, "if there be any plaints, precepts, attachments, or distress hanging in the court rolls," they are "re-hearsed openly in the court," and enquiry is made "how the bailiff has served them." The inquest is then called and sworn. If it is the inquest of the court baron they are charged to present matters affecting the lord's rights, or matters affecting the community—e.g. who are the suitors of the court, withdrawals of rent or service, the doings of bondmen, waste, removal of boundary marks. If it is the inquest of the leet they are charged to present divers criminal offences of all degrees of gravity from petit treason downwards, breaches of the assize of

[1] Vol. i 74-75, 184-187; above 113, 122 n. 2.
[2] Vol. ii 396-400.
[3] See Abbot of Peterborough v. Power and others (1518) Select Cases in the Star Chamber (S.S.) ii 123-142; in this case at p. 139 it was stated in the deposition of the Steward of the abbot that there was a "Great Inquest of the Hundred of Nease of burgh . . . whych hath correcion of all other leates holden within the sayd hundred for lack of dew mynystracion of Justyce within the same;" cf. Talbot v. Cookes (1630), Rushworth vol. ii Pt. *ii.* 23-24 for a case in which the Star Chamber dealt with irregularities in a trial before a court Baron; vol. i 137.
[4] Ibid; below 129 n. 7.
[5] Above 112-113.
[6] Vol. i 182.

bread and beer, nuisances, forestallers and regrators, tavern haunters, the misdeeds of constables, bailiffs, and other officers of the liberty, and whether offences presented at the last leet have been amended or no. The books then proceed to give various model entries of presentments at the court baron and the leet, instructions as to holding the assize of bread and beer, the oaths of various officers, and copyhold conveyancing precedents.

It is clear from these books that even in the sixteenth century considerable parts of England were governed by an undifferentiated court baron with a leet jurisdiction. It was a court with powers of self-government as wide as those which it possessed in the thirteenth century. It could make by-laws,[1] appoint officials,[2] and, by virtue of its comprehensive power to present nuisances, it could stop practices which did not commend themselves to the public opinion of the community.[3] Though weak on its executive side, it was competent to deal with offenders of the humbler class;[4] and the possibility of appeal to the common law courts was some security for the regularity of its procedure.[5] It could not deal with new statutory offences unless specially allowed by the statute to do so.[6] But this power was conferred by no less than seventeen statutes of this period.[7] A statute of James I. testifies to the fact that its business was actually increasing[8] and the truth of this is borne out by the frequency with which the mediæval literature upon it was reprinted. We may conclude

[1] Vol. ii 378; Kitchin, Court Baron and Court Leet 45, "Ou Bilaw est pur commonwealth est bon a lier touts comment touts ne assentirent, come a faire causez, chemin, ou pont. Mes Bilaw a repavier eglise est charge pur ceo ne liera forsque eux que assent," and cf. Y.BB. 44 Ed. III. Trin. pl. 13; 11 Hy. VII. Hil pl. 8; Webb, Local Government, the Manor and the Borough 19, 20—as to the court baron; ibid 27, 28—as to the court leet, citing Burn, Justice of the Peace (Ed. 1820) iii 240.

[2] Webb, op. cit. 28; for these officers see Hearnshaw, op. cit. 90-93.

[3] Webb, op. cit. 27, 28; Hearnshaw, op. cit. 118, 119; Mr. Webb says, "It is difficult to find any kind of personal conduct, whether intrinsically innocent or plainly criminal, and whether or not expressly included among statutory offences, which might not, at one period or another, have found its way as a common nuisance into the presentments of a court Leet Jury;" and that, "this was the root out of which sprang such services as the Maintenance of Roads, the Drainage of Towns, the Paving and Cleansing and Lighting of Streets, and the whole of what we now call Public Health."

[4] Its executive weakness is clearly explained by Hearnshaw, op. cit. 139, 140; probably it was less apparent when communal feeling was stronger, vol. ii 377-378.

[5] Hearnshaw, op. cit. 137-139. [6] Vol. i 136.

[7] 14, 15 Henry VIII. c. 10; 24 Henry VIII. cc. 10 and 13; 32 Henry VIII. c. 13; 33 Henry VIII. cc. 6, 9, and 17; 2, 3 Edward VI. cc. 10 and 15; 7 Edward VI. c. 5; 2, 3 Philip and Mary c. 8; 4, 5 Philip and Mary c. 3; 1 Elizabeth c. 17; 5 Elizabeth c. 1; 13 Elizabeth c. 19; 23 Elizabeth c. 10; 31 Elizabeth c. 7; the only three later statutes which add new duties are 4 James I. c. 5; 21 James I. c. 21; 1 George I. stat. 2 c. 5; for all these statutes see Hearnshaw, op. cit. 122-130.

[8] 1 James I. c. 5—Stewards are not to take the profits of the leet by agreement with their lords because these profits are increasing, and this arrangement tends to the oppression of the subject by vexatious litigation; vol. i 137.

therefore that it was still a living court, and that it had an important, if a humble, part to play in the Tudor scheme of local government.[1]

It is not surprising to find that at the end of this period legal theory has been busy with the leet. The beginnings of the modern legal theories may be found in the books of Kitchin,[2] and Coke.[3] In the first place they differentiated the old undivided court. A court in which justice was administered in the king's name was in their eyes clearly different from a court in which justice was administered in the lord's name; and similarly a court in which the free suitors were judges of their fellows was clearly separate from a court in which the steward judged the copyholders. Thus Kitchin separated the court leet from the court baron,[4] and Coke, the court baron from the court customary.[5] In the second place, they classified the business of the court. In Kitchin's elaborate book we get the distinction between offences presentable and not punishable in the leet, and offences both presentable and punishable.[6] But, whatever legal theorists might say, the old undifferentiated court continued to exist in many parts of England in the old way long after the close of this century.[7] The Steward might perhaps alter the forms of enrolment, and the list of things to be presented, to make them square with orthodox legal doctrine;[8] but little else was altered. In fact Kitchin was doing on a small scale what Coke was doing on a grand scale. Both were representatives of that school of literate Elizabethan lawyers, to which such men as Plowden and Lambard and Bacon belonged, whose great and enduring work was the adaptation of mediæval law and institutions to modern needs. Imagination necessarily played some part in this process of adaptation; and thus they are responsible not only for the enunciation of the rules of modern law, but also for legal and historical theories, the soundness of which was considered by many generations of lawyers and historians to be as incontestable as their statements of law. It is only in these latter days that we have begun to distinguish the validity of their statements of the

[1] Coke, Fourth Instit. 265, "By these and divers other acts of Parliament the jurisdiction of this court of the Leet hath been much increased, to the end that the subject might have remedy and justice at his own doors;" cf. C. J. Cox, Three Centuries of Derbyshire Annals ii 275-280 for some seventeenth century activities of the courts leet of Elveston and Thurston, and Ambaston—it is clear that the common field system of agriculture (vol. ii 56-61) supplied these courts with a good deal of their work.

[2] Above 120-121. [3] Fourth Institute c. 54.

[4] Above 120-121. [5] Vol. i 182. [6] At ff. 8b, 10b.

[7] Webb, Local Government, the Manor and the Borough chap. ii; Hearnshaw, op. cit. 76-78.

[8] Ibid 147, 201, 202.

law from the correctness of the historical premises upon which their legal and historical theories were founded.

The Boroughs.

We have seen that in the Middle Ages the borough was simply a more organized species of that large genus community by means of which the work of local government was carried on.[1] It was a community which had a franchise or franchises; and when we have said that, we have said almost all that it is possible to say about the boroughs in general. It is as impossible to give a precise definition of the whole class in the sixteenth century as it was in the thirteenth century, and as it will be in the eighteenth century.[2] At all these periods communities of many kinds claimed this title, from the small country town which was hardly distinguishable from the rural village, to the city which was a county in itself.[3] We have seen that in the country at large the existence of a franchise tended to preserve institutions which come from the early mediæval period long after they had become obsolete elsewhere.[4] In the boroughs we often see more than a mere survival. The fact that the borough was a chartered franchise, the activities of which were sometimes very different from those of the franchise jurisdictions existing in the country at large,[5] helped not only to preserve but also to develop. The charter both modified the effect of the influences which made for a uniform development in the country at large, and at the same time left the boroughs very free to develop a constitution of their own. In very few boroughs did the constitution depend upon the provisions of the charter.[6] For this reason old institutions and the old modes of government were in the more

[1] Vol. i 138-141; vol. ii 385-395.

[2] Webb, Local Government, the Manor and Borough 261-267.

[3] Vol. i 141. [4] Above 128; vol. i 133, 137-138.

[5] Vol. ii 386-395.

[6] Bateson, Cambridge Charters, Maitland's Introd. viii, ix, "During the Middle Ages the function of the Royal Charter was not that of 'erecting a corporation,' or regulating a Corporation which already existed, but that of bestowing liberties and franchises upon a body which, within large limits, was free to give itself a constitution from time to time. . . . It was very free . . . to develop a conciliar organ, one council or two councils, to define the modes in which burgherhood should be acquired, to adopt the ballot or the open vote, and generally to be as oligarchic or as democratic as it thought fit. . . . No charter proceeding from any Tudor did anything towards defining the constitution of the burghal community, and yet during the reign of Elizabeth the constitution was being frequently altered at important points by the activity of the burgesses in their Common Halls;" as late as 1786 a by-law made an important change in the manner in which the mayor was elected, and the validity of this change was upheld by the Court of King's Bench ibid x; cf. vol. ii 400; as Webb says, op. cit. 271 n. 2, in the post-Restoration Charters "the exact constitution of the Municipal Corporation is the dominant consideration. Few Municipal Corporations were, however, governed by these later Charters, which usually effected only particular amendments of the local constitutions; thus Maitland, speaking of Cambridge, says that the letters patent of Charles I. only gave "a little rigidity to a constitution which had been evolved from within."

progressive boroughs developed upon their own lines; and thus, though we get certain broad resemblances between the officials and the institutions of many of the boroughs, the position of these officials and the form of these institutions were hardly ever identical.[1] It is for this reason that we find in the borough institutions an interesting assortment of the most various pieces of constitutional mechanism. Let us glance briefly at some of the results of this interesting process of mixed survival and development.

A leet jurisdiction similar to that existing in the country at large was one of the commonest of the franchises possessed by boroughs.[2] Though its machinery was cumbersome, the boroughs made it perform a large amount of judicial and administrative work; and, if we look at instances like the court leet of the Savoy[3] or the court leet of Manchester,[4] we can see that it was possible to adapt it to the needs of flourishing urban communities. The court which exercised this jurisdiction was often, even in the municipal corporations which had a separate commission of the peace, an undifferentiated court similar to that which we find in the country at large.[5] In many places in the sixteenth and seventeenth centuries, and in some places right down to the close of the eighteenth century, "the whole constitution still revolved round the leet."[6] But in the larger and more progressive boroughs this undifferentiated court soon began to split up; and new privileges involved the creation of new courts. A separate court for civil business was often granted by charter; and this in its turn was sometimes sub-divided.[7] The possession of such franchises as a market or an Admiralty jurisdiction gave rise to other courts of a special jurisdiction.[8] The same causes which split up the old differentiated court led to the growth of a separate class of officials.[9] They led also to a separation between judicial and administrative organs of government, to which the county institutions attained slowly and imperfectly.[10] The existence of property to be administered helped forward this development. It is not surprising therefore to find that these new administrative organs of government often show signs of springing from a fusion of the gild officials, the

[1] For a general account of these officials see Webb, op. cit. 306-336, and for the institutions see ibid 337-367.
[2] Vol. i 135-136, 142-143.
[3] Webb, op. cit. 99-113.
[4] Ibid 96-98.
[5] Ibid 344, 345.
[6] Ibid 345-349—at Coventry and Queensborough it would appear that decay began in the last half of the seventeenth century; for Southamption see vol. i 136.
[7] Vol. i 148-150.
[8] Webb, op. cit. 358-360; vol. i 531-532, 537-538, 542-543.
[9] Webb, op. cit. 306-336.
[10] Ibid 360-369.

gild organization, and the gild property, with the officials, the organization, and the property of the corporation.[1]

The most advanced of the boroughs got, in the fifteenth, sixteenth, and seventeenth centuries, a separate commission of the peace, and sometimes a separate court of quarter session.[2] Similarly the parochial organization of the country at large appeared in the boroughs.[3] In course of time the justices of the peace and the parochial organization prevailed over the older institutions in these boroughs as they prevailed in the country at large. But the process was much more gradual; and in the sixteenth century it was only just beginning. The old courts and the old officials continued to exist side by side with the new courts and the new officials.[4] Whether we look at the customary rules of private law prevailing in the boroughs,[5] or at the machinery by which these customary rules were enforced and by which the municipal government was conducted, we see many survivals of old customs and old institutions, and some developments of these old customs and institutions which were quite unique.

In the sixteenth century, therefore, both the communal officials and the franchises which survived either in the country at large or in the boroughs kept alive many traces of the legal ideas and institutions of the earlier mediæval period. Their continued existence in a modern state was due, as I have said, to the manner in which they had been controlled, adapted, and developed by the common law of the thirteenth and the following centuries;[6] and the effect of their continued existence was to keep alive the idea of a community which governed itself under judicial forms, subject only to the law.[7] It is hardly possible to exaggerate the historical importance of this phenomenon. It has directly affected the whole history of local government in England, and

[1] "We suggest that the popular idea that the Municipal Corporation arose out of the Gild may be so far justified that in many cases it was the Gild, with its common stock, and even its Corporate trading ventures, that was the origin, if not of the Common Council itself, of some of the characteristic features of the Common Council as we see it in 1689; such as the abandonment of judicial forms and processes, the exclusion of the public, the sworn secrecy of the meetings, the elaboration of the standing orders, and, above all, of the general assumption by Common Councilmen of the functions of an independent Legislature in all Corporation affairs," Webb, op. cit. 362, 363.

[2] Vol. i 143-144.

[3] Webb, op. cit. 393, 394; for the parochial organization see below 155-163.

[4] Thus, for instance, the transition from court leet to quarter sessions was in some places very gradual—in some boroughs "it is quite impossible to distinguish, either in form or in substance, the presentments of nuisances which the Grand Jury made to the Justices in Quarter Sessions from those which the Jury often called the Grand Jury—of the Borough Court Leet were simultaneously addressing to 'their Worships,' the Mayor and other Magistrates who held that ancient Manorial Court," Webb, op. cit. 352, 353; ibid 386 and n. 2.

[5] Vol. iii 269-275. [6] Vol. ii 369-400. [7] Ibid 404-405.

indirectly the development of the whole of the public law of the English state. With its direct effects on the later history of local government I must now briefly deal; its indirect effects upon the public law of the English state will appear when I come to consider the position of Parliament and the ordinary courts of law.

The Later Mediæval Period.

It is during this period that the justices of the peace began to supersede the communal courts and to control the communal officials.[1] We have seen that they were instituted originally to see to the observance of the statutes passed to maintain the peace; and that they were soon given many other duties. By the end of the fifteenth century, the stream of statutes, which in time made them the rulers of the county, had begun to flow.[2] They were given large powers of dealing with the misdeeds of all classes of local officials, from sheriffs and mayors to constables and gaolers.[3] They were given exclusive jurisdiction to try offences presented at the tourn.[4] They were given powers to supervise ordinances made by "gilds, fraternities, and companies corporate".[5] They must see that the numerous statutes dealing with trade, labour, and weights and measures[6] were obeyed; and they were entrusted with the execution of the statutes relating to purveyance, to apparel, to livery, and to Lollards.[7] By the end of the century many of the larger boroughs had acquired by charter separate commissions of the peace;[8] and the justices began, though more slowly than in the country, to supersede the older municipal authorities.[9]

These statutes imposed upon the justices the duty of punishing their breach. Though occasionally this duty was imposed upon one, two, or three justices,[10] the statute rarely stated whether each justice could act separately or whether all must act together. But whether it was imposed upon all collectively at quarter

[1] Vol. i 287-288; B. H. Putman, Enforcement of the Statutes of Labourers chap. i; Beard, op. cit. 33-58; cf. Webb, Local Government, the Parish and the County 294-296.

[2] "The history of the institution . . . is the record of constantly extending jurisdiction along the lines followed by the legislature in regulating labour and industry, maintaining police control, and consolidating the national administrative system," Beard, op. cit. 58, 59.

[3] See Vol. ii 448-449, 457-458 for some of these statutes; Beard, op. cit. 57, 58.

[4] Vol. i 80-81 [5] Vol. ii 400. [6] Ibid 460-461, 466-467.

[7] Beard, op. cit. 65, 68-70; vol. i 617; vol. ii 449, 453, 465.

[8] Nottingham in 1413, Hull in 1440, Canterbury in 1448, Leicester in 1464; cf. Webb, Local Government, the Manor and the Borough 279, 282.

[9] Above 133.

[10] E.g. 13 Henry IV. c. 7; 8 Henry VI. c. 9; 4 Edward IV. c. 1; 17 Edward IV. c. 4.

sessions, or upon some one or more individually, no directions were given as to the procedure to be followed. The legislature, as was usual in the Middle Ages, seems to have proceeded upon the presumption that the law would be obeyed, and considered it sufficient if officials and courts were provided to punish its breach. Thus its justices were put into the position of the older courts and officials who were there, not to take active measures to enforce the law, but to punish breaches of it. The justices, therefore, when they met in quarter sessions, found themselves obliged to adopt what means they could to discover and punish breaches of the law. They naturally had recourse to the old machinery, familiar both to the central and to the local authorities in the eyre and tourn, the machinery of the jury of presentment. Thus the organization of the local government under the justices still followed the old judicial models. It centred upon the quarter sessions; and the business of the quarter sessions centred round the charge to the jury and the presentments which it made.

The scheme of the earlier books which deal with the justices of the peace make this quite clear.[1] They begin with a short description of the office of justice, the time and manner of holding the sessions, a few of their more important duties in connection with the maintenance of the peace,[2] and two writs relative to the trial of prisoners before the itinerant justices.[3] But the main bulk of the treatise centres round the justice's charge to the jury at quarter sessions.[4] The charge consists of a heterogeneous catalogue of the various offences, statutory or otherwise, as to the breach of which enquiry must be made, with occasionally a short note of explanation attached.[5] Scattered amongst the various articles of the charge are short paragraphs as to the justice's duties in relation thereto, as to the maintenance of gaols, bridges, and highways, and as to their duties in relation to the poor and impotent. At the end comes a long Appendix of writs and other formal documents.[6] It includes such things as writs for the purpose of securing the presence of offenders or of the jury, writs of supersedeas, recognisances, mainprise, forms of security for keeping the peace, orders of commitment, forms of indictment for various treasons and felonies, forms of appeals of felony, and forms connected with trial by battle on such appeals, forms of

[1] The following description is taken from "The Boke for a Justice of Peace," Berthelet 1543; for other books see above 112 n. 2.

[2] ff. 1-6b. [3] ff. 6b-7b. [4] ff. 8-31.

[5] E.g. as to the distinction between murder and manslaughter, f. 9b; as to the definition of robbery, theft, and burglary, f. 10; as to the benefit of clergy, f. 10b; as to accessories, ff. 11b-12; as to the statutes of labourers, ff. 17-20.

[6] ff. 33-83b.

indictment for various statutory misdemeanours, for trespasses,[1] and nuisances.

These books show that, right down to the beginning of the sixteenth century, the local government, though controlled by royal nominees, was conducted by means of the judicial procedure and the judicial machinery which were familiar to the common law courts, and to the old communal and franchise courts. The county and the various communities of which it consisted had, from the earliest times, been left to govern themselves after their own fashion, subject always to a liability to punishment if they did not fulfil their legal duties, statutory or otherwise. The justices, like the older courts and officials, whom they were fast superseding, found themselves in a position precisely similar to that occupied by the older authorities. In the first place they were left with a very wide discretion in the exercise of their governmental functions; and, in the second place, the duties which the legislature and their commission imposed upon them, made it necessary that the machinery by which they acted, should take the form of presentment and indictment for the non-performance or the mis-performance of legal obligations.[2] The effect was to give the rules and the judicial processes of the common law a position of decisive importance in the local government of the country; and thus the old idea of local self-government subject to the law was retained in the system of local government, as newly organized under the justices of the peace.[3] The fact that, in the sixteenth century, this idea was preserved, and these self-governing judicial officers of the later mediæval period were adopted as the basis of the scheme of English local government,

[1] In the book from which this summary is taken, f. 77, there is a curious specimen of an indictment for trespass on the case for misfeasance—a person retained to give counsel to another as to his title to real property in an impending action, has disclosed the secrets of his employer to the other side, in consequence of which his employer has lost an assize of novel disseisin; this brings out very clearly the fact that the civil action which might be brought for such a proceeding was based, not on breach of contract, but on wrong, see Somerton's Case, vol. iii 431-432.

[2] See this very well put in Webb, Local Government, the Parish and the County 307-309, "From the standpoint of constitutional law the officers of the county were but instruments to secure the keeping of the king's peace, the due execution of the king's writs, and of the decisions and sentences of the king's judges, the exact and punctual payment of the king's revenues, the safe keeping of the king's gaols, the accommodation of the king's judges, and the maintenance of the great bridges. . . . This theory of obligation on which the whole of English local government was . . . based, explains why the bulk of the county administration was cast in the anomalous forms of presentment and indictment, trial and sentence. . . . It is not too much to say that at the assizes and quarter sessions the county, the hundred, and the parish, together with most of the unpaid and compulsory serving officers, were, one or other of them, always in the dock as defendants to criminal indictments, on which they were perpetually being fined;" it was essentially the same idea as underlay the proceedings of the old justices in eyre, vol. i 269-271.

[3] Vol. ii 404-405.

is a unique phenomenon in Western Europe, of the utmost significance for the future of our constitution and our law.

The Sixteenth Century.

The justices of the peace were the men of all work in the Tudor scheme of local government. The "stacks of statutes" which added to their duties necessitated a more elaborate organization of the justices within each county; the growth of their administrative duties gave rise to the beginnings of a separation between their judicial and administrative functions; and the use which the Tudor kings made of the parish as a unit of the local government of the state, under the control of the justices, further added to their administrative functions. At the end of this period it is apparent that the main work of local government was being done by the justices and by the parochial officials assisted by the parish vestry. At the same time the older mediæval officials—sheriffs, coroners, and constables—had been given an ascertained place in this scheme of local government, while the franchises in town and county still performed many various duties, and existed as exceptions to the general scheme. The result was a system of local government of an extraordinarily heterogeneous character. Though we can see that the most important elements in it were the justices and the parish, there were other elements which have come from all periods of legal history, and have gradually been so adapted that they have been made useful parts in the machinery of the government of a modern state. Such a system is necessarily difficult to describe. I shall endeavour to sketch briefly its salient features under the following heads:—(i) The new powers of the justices of the peace; (ii) the new organization of the justices of the peace; (iii) the rise of the parish as a unit of local government and its relation to the justices of the peace; (iv) characteristics and tendencies of the new system of English local government.

(i) *The New Powers of the Justices of the Peace.*

To enumerate all the powers conferred upon each individual ustice of the peace, upon groups of justices, or upon quarter sessions would involve a summary of the greater part of the legislation of the Tudor period. Such a summary would be both tedious and useless. All that I here attempt is a slight sketch of some of the most important of the powers which the justices exercised in this century. In drawing this sketch I shall follow Lambard's method, and summarize in the first place the powers exercised by a single justice, in the second place the powers exercised by two or more justices, and in the third place the

powers exercised by the quarter sessions. Such a summary will necessarily possess some of the characteristics of a catalogue; but it is necessary to have such a catalogue before us if we are to understand the position of decisive importance which the justices attained in English local government in this century, and kept right down to the latter part of the nineteenth century.

The Single Justice.

Of the 634 pages of Lambard's four Books on the justices of the peace, the second Book, which deals with the powers of a single justice, occupies 235. No doubt some part of it is occupied with relevant dissertations on aspects of the criminal law;[1] but, when all allowances have been made, it will be clear that the powers of the single justice were wide. There is no classification of his powers; but for convenience sake we may group some of the more important under the heads of criminal jurisdiction, civil jurisdiction, administration, trade, and religion.

His criminal jurisdiction in relation to the preservation of the peace is the earliest in point of time, and stands at the head of the list.[2] He can take security for keeping the peace, and for "good abearing," and he can at his discretion release such security.[3] There was much law on this matter, and many forms to be observed. In case of breach of the peace by "menacing, affrays, assaults, injurious and violent handlings and mis-treatings of the person, batteries, malicious strikings, etc.,"[4] the justice, like the constable, could commit to the common gaol, if he could not otherwise stop the affray.[5] Under the statutes of forcible entry he could arrest the delinquent, and reinstate the party ousted.[6] He could order the rioters to disperse, and arrest those who disobeyed.[7] He could order fresh suit, hue and cry, and search to be made by sheriffs and bailiffs for thieves and robbers,[8] and could give orders for the arrest of suspected persons.[9] The

[1] Bk. ii chaps. 2-5 (pp 74-184) contain a summary of the law as to breaches of the peace, riots, routs, and forcible entries; at pp. 226-294 there is a description of the various felonies, and the law connected therewith.

[2] Lambard, Bk. ii chaps. 2 and 3.

[3] Ibid 77 seqq. 110.

[4] Ibid 127.

[5] Ibid 130.

[6] Ibid chap. 4; 5 Richard II. st. 1, c. 7; 15 Richard II. c. 2; 8 Henry VI. c. 9; 31 Elizabeth c. 11.

[7] Ibid chap. 5; 1 Mary st. 2 c. 12; 1 Elizabeth c. 16—these statutes (pp. 183,184) authorize them to make proclamation that the rioters depart; but, though, "one justice of the peace alone may do some what to prevent a rout or a riot, before it be done, and for the stay of it whilst it is in doing," he can do nothing "to punish it as a riot or rout when it is committed and done," ibid 182.

[8] 2 Edward III c. 3; Lambard 185-186.

[9] Ibid; as to their powers to arrest suspected persons see vol. i 294-295; vol. iii 600-603.

statutes relating to unlawful hunting,[1] unlawful games,[2] to tippling in ale-houses,[3] to the sale by soldiers of their harness,[4] to gypsies, or Egyptians as the statutes called them,[5] to the preservation of game,[6] to sanctuaries,[7] to thefts of horses,[8] to rogues and vagabonds,[9] to robbers of gardens and orchards,[10] and to the examination of felons[11]—all added to his criminal jurisdiction. In such cases as these, says Lambard, "the justice of the peace, having (as it seemeth) the whole matter committed to himself alone, ought to be wary and circumspect, lest either he rashly condemne the guiltlesse, or negligently suffer the guiltie to escape; and upon the offence sufficiently proved, it is necessarie that in his *mittimus* (a precept to the gaoler) there be contained the names of the parties, with the manner of the offence, and how long time he is to be kept in prison for it. Furthermore, he is to make a record of the matter, and to send the extract of it unto the Exchequer, whereby the Barons may cause the King's dutie to be levied to his use."[12]

His civil jurisdiction was comparatively small. It was confined to the settlement of disputes between master and servant, or between masters and their apprentices.[13]

His administrative powers were almost the creation of the statutes of this century. He had extensive powers as to the conservation of rivers, dating from the fourteenth century.[14] He must present at the sessions all offences presented to him by the supervisors for the amendment of highways.[15] He could, on the complaint of the party grieved, deal with alleged irregularities in the county and hundred courts.[16] If the parishioners, churchwardens, and constables made default, he could assess and levy the rates made at the Easter Sessions,[17] or the rate for the relief of disabled soldiers.[18] He could send to the house of correction those who refused to work.[19] He could give testimonials to shipwrecked

[1] 1 Henry VII. c. 7.
[2] Vol. ii 466; 12 Richard II. c. 6; 33 Henry VIII. c. 9.
[3] 1 James I. c. 9; 4 James I. c. 5; 7 James I. c. 10.
[4] 2, 3, Edward VI. c. 2.
[5] 22 Henry VIII. c. 10; 1, 2 Philip and Mary c. 4.
[6] 23 Elizabeth c. 10; 7 James I. c. 11.
[7] 22 Henry VIII. c. 14; vol. iii 306.
[8] 31 Elizabeth c. 12.
[9] 22 Henry VIII. c. 12; 39 Elizabeth c. 4; 1 James I. cc. 7 and 25; see Lambard 207-211 for an exposition by the judges of Elizabeth's reign on these and other statutes concerning rogues.
[10] 43 Elizabeth c. 7.
[11] Vol. i 296; 1, 2 Philip and Mary c. 13; 2, 3 Philip and Mary c. 10; Lambard 212-215.
[12] Pp. 296, 297.
[13] 5 Elizabeth c. 14.
[14] Vol. ii 467; Lambard 189, 190, citing 17 Richard II. c. 9.
[15] 5 Elizabeth c. 13 § 7; 27 Elizabeth c. 11
[16] 11 Henry VII. c. 15.
[17] 43 Elizabeth c. 2; 1 James I. c. 25.
[18] 43 Elizabeth c. 3; 1 James I. c. 25.
[19] 43 Elizabeth c. 2 § 2; 1 James I. c. 25.

seamen, or to soldiers and sailors returning from abroad, which authorized them to travel to their homes and to ask and take relief on the way.[1]

Over matters pertaining to trade he had a number of miscellaneous powers. He must see to the observance of the assize of fuel,[2] and his certificate (with that of the customer) as to the unlading and selling of corn carried by water was sufficient to rebut a charge of forestalling.[3] He must supervise the manufacture of malt,[4] and see that the statutes relating to several other trades were observed.[5]

The religious settlement of Elizabeth's reign imposed upon him a number of new duties. If any person informed him of the delivery of any cross, picture, or other superstitious thing from Rome, and of the name and address of the deliverer, he must make a report to some member of the Council;[6] he could fine for non-attendance at Church,[7] and could certify non-attendance during twelve months to the King's Bench;[8] and, in default of submission, he could get from quarter sessions an order that seditious sectaries who obstinately refused to attend church should abjure the realm.[9]

Two or More Justices.

"It is universally true," says Lambard, "that whatsoever thing one Justice of the Peace alone is permitted to do, either for the conservation of the Peace, or in the execution of the commission (or Statutes), the same may be no less lawfully performed by two (or more) Justices; except it be in a very few cases, when some Statutes do seem especially to appropriate the execution thereof to some one certain Justice, either in respect that he is next to the place, eldest of the Quorum, or such like."[10] In fact the powers of two or more justices were similar in kind, but greater in degree. In the exercise of their criminal jurisdiction they could punish riots, and, if they were hindered by the perversity of the jury, or by maintenance or embracery, they must certify the facts to the Council.[11] There was much law and many forms to be observed in executing this part of their duty.[12] There

[1] 39 Elizabeth c. 4 § 17, and c. 17 § 6; 1 James I. c. 25.
[2] 7 Edward VI. c. 7.
[3] 5, 6 Edward VI. c. 14 § 9; 13 Elizabeth c. 25.
[4] 2, 3 Edward VI. c. 10; 27 Elizabeth c. 14; 39 Elizabeth c. 16.
[5] Watermen on the Thames, 2, 3 Philip and Mary c. 16; the cloth trade in the Northern counties, 39 Elizabeth c. 20.
[6] 13 Elizabeth c. 2 §§ 5 and 7.
[7] 1 Elizabeth c. 2; 3 James I. c. 4 § 18.
[8] 23 Elizabeth c. 1 § 4.
[9] 35 Elizabeth c. 1.
[10] At pp. 309, 310.
[11] 15 Richard II. c. 2; 13 Henry IV. c. 7; 2 Henry V. c. 8; 8 Henry VI. c. 14; 19 Henry VII. c. 13.
[12] See Lambard 313-330.

was also much law on that part of their duties which related to the bailing of prisoners.[1] They must carefully observe the general statute relating to bail,[2] and also the particular statutes for the breach of which the prisoner was accused,[3] "both for fear of wrong by denying it to him that is replevisable, and for fear of danger to the service itself by giving it where it is not grantable."[4] They could deal with offences under the statutes of labourers.[5] They could levy the forfeitures incurred by reason of convictions under the statutes dealing with rogues and vagabonds.[6] They could convict for offences under the game laws,[7] make orders in respect to bastard children,[8] and deal with those who evaded their liability to contribute to the subsidy.[9]

Their civil jurisdiction was inconsiderable. The only instance appears to have been a jurisdiction to supervise certain partitions between lords and commoners if appointed for this purpose by the sessions.[10] On the other hand, their administrative duties were large. In the first place, they had many duties in connection with the poor law—the appointment of overseers,[11] taking the accounts of the expenditure of the overseers and churchwardens upon the binding of apprentices,[12] assessing rates to relieve poor parishes,[13] binding poor apprentices.[14] In the second place, they were given control of sheriffs, and other of the older officials of local government. They could take the oaths of office of under-sheriffs and their subordinates,[15] and examine the sheriffs' books and amerciaments inflicted by them.[16] In the third place, they could license ale-houses;[17] and a law for these licensed houses was already growing up, for "in some shires the Justices of the Peace do condescend upon certain articles, framed by their discretions, and generally to be propounded to all common ale sellers, taking bond for the performance of the same articles, a copy whereof they do usually deliver to every one of them."[18] Fourthly, they had a number of miscellaneous duties, such as giving testimonials to servants dismissed,[19] the licensing of diseased persons to go to Bath or Buxton,[20] making regulations in time of plague,[21] the

[1] Lambard 340-353.
[2] 3 Edward I. st. 1 c. 15; 3 Henry VII. c. 4; 1, 2 Philip and Mary c. 13.
[3] See Lambard 351-352 for a list of these statutes.
[4] Lambard 348.
[5] 5 Elizabeth c. 4.
[6] 39 Elizabeth c. 4; 1 James I. c. 7.
[7] 1 James I. c. 27; 7 James I. c. 11
[8] 18 Elizabeth c. 3 § 1; 1 James I. c. 25.
[9] See e.g. The Subsidy Acts, 13 Elizabeth c. 27 § 15; 43 Elizabeth c. 18 § 14.
[10] 35 Henry VIII. c. 17 § 6; 13 Elizabeth c. 25.
[11] 43 Elizabeth c. 2; 1 James I. c. 25.
[12] 7 James I. c. 3 § 5.
[13] 43 Elizabeth c. 2; 1 James I. c. 25.
[14] 39 Elizabeth c. 3.
[15] 27 Elizabeth c. 12.
[16] 11 Henry VII. c. 15.
[17] 5, 6 Edward VI. c. 25.
[18] Lambard 355, 356.
[19] 14 Elizabeth c. 5 § 11; 27 Elizabeth c. 11.
[20] 39 Elizabeth c. 4 § 7; 1 James I. c. 25.
[21] 1 James I. c. 31.

supervision of the accounts of hospitals,[1] the assessment of the liability of the hundred for robberies therein committed.[2]

Three or more justices had still wider powers. They could examine the accounts of charitable foundations,[3] and they had powers in relation to decayed bridges,[4] and in relation to gaols[5] and sewers.[6] In relation to trade they could deal with many miscellaneous matters—the manufacture of malt,[7] the supervision of the cloth trade,[8] weights and measures.[9] In relation to religion they had large powers, of which the following are examples: they could deal with those who disturbed preachers.[10] They must assist the ecclesiastical judges in their jurisdiction over tithes.[11] They could search for popish books,[12] and require popish recusants to abjure the realm.[13]

The Quarter Sessions.

Though the powers and the duties of the justices out of the sessions had been so largely increased, the principal work of the justices still centred round the sessions. It was only in a session of the peace that they could execute "their general authority" to enquire by a jury, and to hear and determine all the cases within their commission, and all the other matters referred to their charge by particular statutes.[14] Both the work of the sessions, and the procedure by which that work was conducted, were quite different from the work of hearing those miscellaneous cases which various statutes had referred, sometimes to a single justice, and sometimes to two or more justices.

The procedure of the sessions was still in substance the mediæval procedure.[15] It still centred round the charge which the justices gave to the jurors, and round the presentments and indictments which the jurors made in obedience to that charge; and the competence of the court was still large and vague.[16] As

[1] 14 Elizabeth c. 5 § 32; 39 Elizabeth c. 18.
[2] 27 Elizabeth c. 13.
[3] 14 Elizabeth c. 5 § 37; 39 Elizabeth c. 18.
[4] 22 Henry VIII. c. 5 (four justices).
[5] 23 Henry VIII. c. 2; 13 Elizabeth c. 25 (six justices).
[6] 13 Elizabeth c. 9 (six justices).
[7] 39 Elizabeth c. 16.
[8] 3, 4 Edward VI. c. 2; 1 James I. c. 6.
[9] 11 Henry VII. c. 4; 12 Henry VII. c. 5.
[10] 1 Mary st. 2 c. 3—but it was a question whether this statute was in force in Elizabeth's reign, Lambard 195, 333.
[11] 32 Henry VIII. c. 7.
[12] 3 James I. c. 5 § 15.
[13] 35 Elizabeth c. 2 § 5.
[14] Lambard 378, 379.
[15] Above 134-137; Lambard Bk. iv chap. 2.
[16] "Nothing seems to have been too trivial or too absurd to be brought before the court, from the lady who spoke evil of her mother-in-law to the man who took exorbitant interest on the money he lent, from the man who abused the Evesham authorities to the parson who called a parishioner a devil, from the lady whose child "many fathers shared" and who got an order that each should maintain it, to the lady whose character suffered from being told she was not fit to bring a dog to bed much less a woman—one and all came to Sessions to have their wrongs redressed," J. Willis Bund, Worcester County Records ii *cxxxv*; cf. also North Riding

in the thirteenth century, when the whole county met to inform the king's justices in eyre of the crimes, negligences, and ignorances of which private persons, officials, and communities were guilty,[1] so in the sixteenth and seventeenth centuries the whole county met the justices of the peace in their sessions[2] to give them very similar information.[3] As in the earlier, so in the later period, there were present the older officials of the county—the sheriffs, the bailiffs, and the constables; there were present also the jurors—particular jurors from each hundred and a general jury from the body of the county;[4] and with the justices came their own officials, the custos rotulorum and the clerk of the peace.[5] This assembly also was gathered together by precepts from the sheriff in much the same way as the older assembly which met the justices in eyre,[6] and, when it met, the justices of the peace, like the justices in eyre, gave in charge to the jury the articles of which they were to enquire. When Lambard wrote the number of these articles was evidently causing embarrassment to the justices. He recommends that only those laws which were of practical importance should be fully explained, and the others "only touched or run over by way of short articles."[7] As to the arrangement of these articles he suggests several schemes; and we have extant an actual charge given by Lambard himself in which the Ten Commandments are made the basis of classification.[8]

Lambard arranges the articles under two main heads—Ecclesiastical causes,[9] and Lay causes; and the latter are subdivided into felonies,[10] and offences under the degree of felony.[11] A reference to the Appendix, in which the heads of these articles are set out, will illustrate the large extent of the business of the sessions, and manner in which it had been increased by the Tudor

Sessions Records 106, 108 (1607-1608)—gamesters are presented who waste their estates at cards; ibid 147 (1608-1609)—drunkenness and immorality; ibid 19 (1605)—a warrant issued to apprehend a man who had committed adultery with his brother's wife; J. C. Cox, Three Centuries of Derbyshire Annals ii 243, 244, 245.

[1] Vol. i 265-269.

[2] Lambard Bk. iv chap. 3; cf. L. and P. xii *i* no 32; that the sessions had thus superseded the old county court as the place where the county business was done is illustrated by 32 Henry VIII. c. 43, which enacted that, as the county palatine of Chester has now justices of the peace and quarter sessions, the number of sessions of the county court for county business should be reduced.

[3] Cf. Lambard 405 for a few minor points of difference.

[4] Ibid 398. [5] For these officials see below 149-150.

[6] Lambard tells us 380, 381 that a precept in writing is not absolutely necessary, but that the sessions are "commonly and most orderly summoned" in this way.

[7] At pp. 405, 406.

[8] Nichols Bibliotheca i App. VI, 517-524; see pp. 406, 407 for some suggested schemes, e.g. under the heads Ecclesiastical and Lay, relating to God, the Prince, or the subject, the first or second table of the Ten Commandments, the four cardinal virtues.

[9] At pp. 410-420. [10] At pp. 420-429. [11] At pp. 429-484.

legislation.[1] It will be seen that most of the business of the county, both judicial and administrative, was in this way brought before the justices assembled in quarter sessions; and that both their old and their new functions were fitted into the mediæval frame-work of presentment, indictment, and trial. It followed that all the technical rules as to procedure and pleading which characterized the criminal law must be strictly observed.[2] It followed also that the duty of seeing that these rules were observed naturally fell to the judges of the ordinary courts of common law, by whom these rules had been created, and by whom they were applied either at Westminster or on circuit. Thus the mediæval forms, under which much of the local government was conducted in this century, ensured the continuance of the control of the ordinary courts and the ordinary law.

But though Lambard's book tells us that the main business of the justices still centred round the sessions with their mediæval procedure, there are signs that that procedure was beginning to be inapplicable to the conduct of the local government of a modern state. In the first place, as we have seen, the work of the justices out of sessions was rapidly increasing.[3] In the second place, at the sessions themselves the justices were empowered to take independent action[4] upon many matters—such as rating,[5] giving licences for various purposes,[6] the poor law,[7] supervision of houses of correction,[8] the fixing of the rates of wages;[9] and we can see the beginnings of their appellate jurisdiction in the provisions of the statutes of 1572 and 1601 as to appeals to quarter sessions against rates made by churchwardens and other persons.[10] In the third place the business of presentment was ceasing to be performed by the inhabitants at large. It was falling into the hands of the high constables, who gathered information from the petty constables, and made the presentments as the representatives of the hundreds.[11]

[1] App. I (2).

[2] See Lambard's chapters on Indictments and Presentments (Bk. iv c. 5); Informations (c. 6); Certiorari (c. 7); Process and Supersedeas (c. 8); and Trial cc. 21-14; vol. iii c. 6 § 1.

[3] Above 138-142.

[4] Thus in the North Riding Sessions Records vol. i the account of the presentments is followed by an account of the different orders made at the sessions.

[5] 14 Elizabeth c. 5 § 38; 39 Elizabeth c. 3 § 12; 43 Elizabeth cc. 2 and 3; 1 James I. c. 25.

[6] 7 Edward VI. c. 5 (taverns for sale of wine); 5 Elizabeth c. 12 (badgers and drovers); 1 James I. c. 27 (certain shooting licenses).

[7] 39 Elizabeth c. 3; 43 Elizabeth c. 2.

[8] 39 Elizabeth c. 4.

[9] 5 Elizabeth c. 4; 39 Elizabeth c. 12; 1 James I. c 25.

[10] 14 Elizabeth c. 5 § 35; 43 Elizabeth c. 2 § 5.

[11] J. Willis Bund, Worcester County Records Pt. ii *xcix*, *c*; cf. Lambard 398, who explains that the common manner in Kent is to return particular juries for the

The result was that, though an elaborate charge was given, very little came of it—"in these days of ours," says Lambard, "wherein the affairs of the Sessions be exceedingly increased . . . many do scantly afford them three whole hours, besides the time which is spent in calling of the county and giving of the charge."[1] No doubt for many years to come presentments made by many different kinds of juries—by grand juries drawn from the body of the county, by the hundred juries, by juries of constables, and by justices themselves—will rouse the justices to do some particular piece of county business.[2] But they will gradually become formal, and then disappear. Already in the sixteenth century we can see the beginnings of the process which will substitute for the mediæval machinery of presentment, and the judicial proceedings taken thereon, other modes of doing the administrative business of the county.

It is clear that the large additions which the Tudors had made to the powers of the justices were necessitating a further organization of the assemblies in which the justices performed their functions, and a new grouping of the justices for the various parts of their work. From the latter part of the sixteenth century onwards these changes slowly and gradually took place all over the country, as the exigencies of the growing powers of the justices made them necessary. We must now describe the beginnings of these changes, the ultimate effect of which was to adapt the mediæval organization of local government under the justices to meet the new demands made upon that local government by the modern state.

(ii) *The New Organization of the Justices of the Peace.*

In the sixteenth century the movement towards a more elaborate organization of the justices took two forms. In the first place we can distinguish from the quarter sessions several different kinds of sessions at which the justices did various duties; and from these sessions we can distinguish the cases when the justices acted singly or in groups of two or more. In the second place, we can see the rudimentary beginnings of a clerical staff.

hundreds and one general jury for the whole shire—"this last is made up with us (for the most part) of the Constables only;" the hundred juries are seldom present in full force, and therefore, "the whole enquiry standeth only upon their labour that are empannelled for the body of the shire, that is to say, upon one man of each hundred or two at the most."

[1] At p. 606.

[2] Webb, Local Government, the Parish and the County 446-479, traces their gradual decay from the end of the seventeenth to the nineteenth century; but in some places they still played an important part, even in the middle of the eighteenth century; thus in Derbyshire in 1748 orders made by the justices for the repair of the houses of correction were held to be void because not made on the presentment of a jury, C. J. Cox, Three Centuries of Derbyshire Annals i 117.

(*a*) The differentiation of the sessions.

The statutes which piled so many duties upon the justices, recognized the individual justice or justices whom they required to perform this or that function. They recognized also the quarter sessions. But it became apparent, as the sixteenth century progressed, that other sessions besides the quarter sessions were necessary for the due performance of their judicial and administrative work. A statute of 1541-1542[1] attempted to provide a scheme to meet this need by constituting local sessions for the performance of certain parts of their duties. It directed that at the sessions of the peace holden next after Easter they should assemble themselves together diligently to examine the contents of certain statutes named in the Act,[2] and devise how the same "may be best put in due and just execution." They were directed to divide themselves so that two at least were assigned to each hundred; and in each hundred they were directed to hold a session every quarter, besides the general quarter sessions of the peace, at least six weeks before the quarter sessions.[3] At these sessions enquiry was to be made by a jury, or by any other means of information, into all offences committed, and process was to be issued against offenders. But this statute was found to lay down too rigid a rule, and was repealed in 1545,[4] as unnecessarily burdensome. The justices were left to organize themselves in the manner best fitted to the business with which they were entrusted; and, considering the multiplicity of functions which Parliament continued to heap upon them, it is difficult to see what other course could have been pursued. Hard and fast statutory rules would have failed to produce an organization sufficiently elastic to meet the needs of their ever-growing powers.[5]

We have seen that, when Lambard wrote, the main division was between the work done out of sessions and the work done in sessions.[6] For the work done out of sessions no specific organization was provided. It could only be classified according as the legislature had conferred powers upon one, or upon two or more justices. It is in the powers conferred upon two or

[1] 33 Henry VIII. c. 10.

[2] § 1, Laws touching vagabonds, retainers, liveries, maintenance, embracery, bowstaves and archery, unlawful games, forestallers, regrators, victuallers and innkeepers; § 6, offences against the statutes of apparel.

[3] § 1.

[4] 37 Henry VIII. c. 7; Lambard, Bk. iv c. 20 following the words of the repealing statute, speaks of the "inconvenience of troubling the countrie that hapned by the six weekes sessions."

[5] Royal Proclamations sometimes assisted the process, Tudor and Stuart Proclamations no. 389.

[6] Above 118-119, 144.

more justices that we may see the cause for the rise in the eighteenth century of the petty sessions.[1]

It is clear from Lambard's book that all the work done in sessions was not done at the quarter sessions. The justices were left a very free hand to summon what sessions they pleased. Though the times at which the quarter sessions were to be held was fixed,[2] and though certain specific things could only be done at certain meetings of quarter sessions,[3] as a general rule there was nothing to prevent any two or more justices from summoning special meetings to deal with any part of their business.[4] Towards the end of the century there are signs that it is becoming usual to delegate certain functions to certain special assemblies. It is clear from a statute of James I.'s reign that it was a course which had for some time been pursued in relation to the fixing the rates of wages;[5] and similar schemes for the performance of other parts of their duties were ordered to be observed sometimes by the Council, and sometimes by the judges of assize. Thus in June, 1605, a scheme, not unlike that set forth in the repealed Act of Henry VIII. was ordered by the Council to be observed by the Justices in all the counties of the realm.[6] It was directed that "upon conference of Assizes and Justices of the peace of every several county at the next assizes to be holden in the same, convenient and apt divisions be made through every county and riding, and that fit Justices of the Peace be assigned to have the special charge and care of every such division, and these to be answerable for such defects as through their defaults shall happen therein. And every such division to be so made as none be driven to travel above seven or eight miles." Meetings of the justices of these divisions were to be held "once between every general Sessions of the Peace near about the mid-time between

[1] Webb, The Parish and the County 298-299: "In some counties . . . the magistrates of each Division seem voluntarily to have agreed to meet—or to arrange for at least two among their number to meet—regularly, between the days appointed for 'Special Sessions' . . . in order to transact in a formal Petty Session such business as required the concurrence of two Justices, or more legal knowledge than they had individually at their command," ibid at pp. 400-401; this change took place in Middlesex as early as 1705. The term "Petty Sessions" is a modern term, vol. i 293; but we get the expression "Petit Sessions" as early as Elizabeth's reign to denote the sessions held in each hundred by the High Constable for the hiring of servants under 5 Elizabeth c. 4, C. J. Cox, Three Centuries of Derbyshire Annals 7.

[2] Vol. i 292; Lambard 596-605.

[3] Ibid 600, 619-621.

[4] Ibid 378, 379; at p. 623 he says that they could be held at any time, and that they had this power both by their commission and by 2 Henry V. c. 4: generally they were held "for some special business, and not directed to the general service of the commission;" sometimes the Council directed a special sessions to be held for a particular purpose, see e.g. Dasent xii 242 (1580).

[5] 1 James I. c. 6 § 2—which legalized the practice for this purpose, and with this object modified 5 Elizabeth c. 4 § 11.

[6] For the full text see A. H. A. Hamilton, Quarter Sessions from Elizabeth to Anne 67-71.

each such sessions;" and at these meetings they were to see to the enforcement of certain specified statutes.[1] They were to appoint a clerk to record the proceedings, and the constables of every hundred and the petty constables were to be present to give information as to the offences committed. In 1609 the Council admonished them as to their neglect in obeying their orders, and as to their remissness in carrying out their other duties, as a result of which the Devonshire Justices appointed six of themselves "for the execution and dispatch of such directions as shall be received concerning His Majesty's service."[2] At the Devon Assizes in 1612 the judges ordered that the justices in each division should meet once at least between every session, and once before every assize.[3] It is in these meetings for special purposes that we can see the roots of the various special sessions at which in later times such special functions as control over highways and licensed houses were performed.[4]

We have seen that at the quarter sessions themselves there was in fact a distinction between the main business of the sessions, which centred round the presentments of the jurors made in answer to the charge of the justices, and the business which was dealt with by the justices without the help of the jury.[5] It is in this distinction that we can see the germs of the distinction between the judicial and the administrative side of the justices'[6] work—between their criminal jurisdiction and the "county business."

We can see, therefore, that the large powers conferred on the justices by the Tudor legislature, and the control exercised over

[1] "The Statutes of Labourers, the Statutes concerning ale houses and tipplers, the Statutes of the Assize of Bread and Drink, the Statutes concerning Rogues and Vagabonds, the Statutes for setting the Poor on Work and to bind their children Prentices . . . and to be informed of all manner of Recusants, as well Popish as Sectaries, Murderers, Felonies, and Outrages within that limit. And to execute the statutes concerning Artificers, matters of the Peace, and all other things within their several divisions as aforesaid. . . . But especially such as keep ale houses without licence may there be examined and presently punished according to the law. And that such as having licence do abuse the same, or not observe these articles, be put down and proceeded with upon their recognisances and such like," ibid 69.

[2] A. H. A. Hamilton, op. cit. 78-80; in Worcestershire there were monthly meetings, Worcester County Records Pt. i, *ix*; cf. North Riding Sessions Records i 204 (1610) for similar orders in Yorkshire; as Mr. Atkinson says, ibid 190 n., we get various sessions called by different names such as e.g. six weeks sessions, three weeks sessions, brewster sessions.

[3] A. H. A. Hamilton, op. cit. 81.

[4] For the later history of these special sessions see Webb, Local Government, the Parish and the County 396-400. We may note that in Derbyshire we get, after the Restoration, frequent references to "private sessions or monthly meetings," C. J. Cox, Three Centuries of Derbyshire Annals i 7.

[5] Above 144.

[6] See Webb, op. cit. 480-483 for the development of this distinction and its causes in the eighteenth century.

them by the Council and the judges, were beginning to produce the beginnings of an organization among the justices for the performance of various parts of their duties. It has not as yet gone far; but it has gone far enough to enable us to see the main lines upon which it will proceed in the future.

(*b*) The beginnings of a clerical staff.

From an early period one of the justices had been selected by the king to keep the rolls of the peace,[1] and this *custos rotulorum* had probably always enjoyed an honorary precedence among his fellows.[2] In the sixteenth century he had become sufficiently important to attract the attention of the legislature, which had enacted in 1545,[3] that he should be directly appointed by the crown—though in the next reign a return was made to the old plan of appointment through the Lord Chancellor.[4] It was from the custos rotulorum that the small clerical staff possessed by the justices emanated;[5] and this was quite in accordance with the mediæval ideas, expounded by Coke in *Mitton's Case*.[6] The official responsible for the records of the court ought, because he was responsible, to appoint its clerical staff. Otherwise the law would be imposing responsibility for the acts of persons whom the person responsible did not appoint, and could not therefore control.[7] This was a principle which was applied to the officials

[1] Vol. i 290; he is mentioned in Y.BB. 9 Ed. IV. Pasch. pl. 6; 2 Hy. VII. Mich. pl. 2; cf. Harcourt v. Fox (1693) 1 Shower K.B. at pp. 527-536 *per* Holt C.J.; cf. Webb, op. cit. 285-287.

[2] Lambard tells us, at p. 387, that, "the custos rotulorum hath worthily the first place, both for that he is always a justice of the Quorum in the commission, and amongst them of the Quorum a man (for the most part) especially picked out either for wisdom, countenance, or credit;" "by his office he is rather termed an officer or minister than a judge," Cowel, Interpreter, *sub voc.*

[3] 37 Henry VIII. c. 1.

[4] 3, 4 Edward VI. c. 1; this statute was repealed by 1 William and Mary Sess. 1 c. 21 § 3 which restored 37 Henry VIII. c. 1. It appears from Lambard 390 that he was often careless in his custody of the records, leaving them with the clerk of the peace, after whose death "these records are hardly recovered, and that piecemeal from his widow, servants, or executors, who at their pleasure may embezzle, misuse, or conceal what they will."

[5] Harcourt v. Fox (1693) 1 Shower K.B. 527-536; Harding v. Pollock (1829) 6 Bing. 25; Lambard 393, 394; Webb, op. cit. 287 n. 1.

[6] (1584) 4 Co. Rep. 32b, 33b—"and if the record be embezzled, the sheriff shall answer for it, and therefore it would be full of danger and damage to sheriffs, if others should be appointed to keep the entries and rolls of the County Court, and yet the sheriff should answer for them as immediate officer to the Court and therefore the sheriff shall appoint clerks under him in his County Court, for whom he shall answer at his peril; the same law of the sheriff's turn."

[7] "And it would be the most unreasonable thing in the world that the *custos rotulorum* being entrusted with the custody of the records by his commission, any other should be made clerk of the peace, for the actual possession of those records, than such an one as he should appoint, when upon any loss or miscarriage, he is answerable for it himself to the king and the subject," *per* Holt C.J., Harcourt v. Fox (1693) 1 Shower K.B. at p. 530.

both of the sheriffs and of the central courts of law; and we have seen that it was jealously guarded from all attempts at royal encroachment.[1] Thus from an early date the *Clerk of the Peace*—the official responsible for drawing up the records of the peace and the other clerical work of the sessions—had probably in most cases[2] been the appointee of the Custos Rotulorum; and it was enacted in 1545 that this should be the law for the future.[3] By the statute of Richard II.'s reign, which allotted 4s. a day to the justices during the sessions,[4] the clerk of the peace was given half that sum during the same period.[5] But, like other mediæval officials, his chief remuneration was derived from fees charged for work done.[6] He was allowed to appoint a deputy,[7] and for certain purposes he was regarded as the representative of the shifting body of justices.[8]

Individual justices had, probably from an early period, their private clerks who were similarly remunerated;[9] and, as the various sessions, special and petty, sprang up, we get other clerks performing duties similar to those performed by the clerk of the peace at quarter sessions;[10] and gradually gaining official recognition.[11]

Besides this scanty clerical staff the justices had at this period no other paid officials attached to them. It is not for a century

[1] Vol. i 260-261.

[2] Not in all; 37 Henry VIII. c. 1 § 3 makes it clear that in some places he had been directly appointed by the king; cf. Harding v. Pollock (1829) 6 Bing. 25.

[3] 37 Henry VIII. c. 1 § 2—"Every custos rotulorum for the time being shall at all times hereafter . . . nominate . . . all . . . persons which hereafter shall be clerks of the peace . . . ; and to give and grant the same office . . . of the clerkship of the peace to such able persons instructed in the laws of this realm as shall be able to exercise and occupy the same."

[4] 12 Richard II. c. 10; for some account of the history of the wages paid to the justices see Webb, Local Government, the Parish and the County 423 n. 1; and cf. vol. i 289.

[5] 12 Richard II. c. 10; the clerk of the peace is mentioned in Y.BB. 13 Hy. IV. Mich. pl. 33; 2 Hy. VII. Mich. pl. 2.

[6] Webb, op. cit. 503; cf. vol. i 255-256.

[7] 37 Henry VIII. c. 1 § 2.

[8] It is clear from Y.B. 2 Hy. VII. Mich. pl. 2 that, though appointed by the custos rotulorum, he was both the servant of the justices and expected to look after the interest of the king; thus if the party grieved would not sue on a recognisance of the peace, the clerk must sue in the king's name; and this idea that it is the clerk who was the person to take action was strengthened by statute; thus 27 Elizabeth c. 13 §§ 1 and 2 enacted that an action against the inhabitants of a hundred, who had not followed the hue and cry, was to be in the name of the clerk of the peace, and that his death was not to abate the action.

[9] Webb, op. cit. 413-414; see ibid 348-350 for some account of these clerks in the eighteenth century; it is noted at p. 348 n. 2 that a legal manual was written as early as 1660 for justices' clerks.

[10] In the directions of the Privy Council in 1605 to hold divisional sessions between the quarter sessions, above 147-148, the justices were instructed to appoint a clerk to keep a note of the proceedings, A. H. A. Hamilton, op. cit. 70.

[11] Webb, op. cit. 414, 415.

or more that we shall meet a county treasurer;[1] and we must wait still longer before we meet a county surveyor.[2]

That the justices were able to do their work with this scanty official staff is due in part to the fact that they were able to use the old officials of the communal and franchise courts,[3] and in part to the manner in which they were assisted by the new parochial organization, which was taking shape in this century, and gradually occupying the place left vacant by the decay of the old communal organization of hundred, tourn, and leet. Of this new unit in local government, therefore, and of its relation to the justices we must say a few words.

(iii) *The Rise of the Parish as a Unit of Local Government and its relation to the Justices of the Peace.*

From an early period the Parish had been a community occupying a definite tract of land, the affairs of which were, in the absence of a custom to the contrary, managed by its adult members.[4] Writers of the middle of the last century thought that it was originally a secular community. They thought, therefore, that it had always possessed those secular functions which they saw it performing,[5] and that its ecclesiastical functions were of later origin and of minor importance.[6] In their opinion its historical importance lay in the fact that it had a prescriptive claim to be the unit of all local administration;[7] and in this supposed fact that English local government was thus founded upon a self-governing and self-sufficing unit of this kind, and not upon the powers of officials acting merely as the agents of the central government, they discerned the efficient secret of the English constitution.[8]

That the English system of local government differs fundamentally from the continental system because it is a system of self-government, is, as I have already pointed out, perfectly true.[9]

[1] Webb, op. cit. 507-512; the Elizabethan plan was that the justices should appoint special treasurers for special rates such as the poor rate, or the rate to relieve distressed soldiers, see 39 Elizabeth c. 3 § 13; 43 Elizabeth c. 2 § 12, and c. 3 § 3. In Derbyshire, from Elizabeth to Anne, the clerk of the peace acted as county treasurer, C. J. Cox, Three Centuries of Derbyshire Annals i 119; the first definite appointment of a county treasurer in that county was not till 1708, ibid 120.

[2] Webb, op. cit. 512-521.

[3] Above 122-125.

[4] Hobhouse, Churchwardens' Accounts (Somerset Rec. Soc.) iv *xi*.

[5] Toulmin-Smith, The Parish 15, "the Parish is the original secular division of the land; made for the administration of justice, keeping of the peace, collection of taxes, and the other purposes incidental to civil government and local well-being."

[6] Ibid 23-25; but the view there put forward, that because the boundaries of the parish were sometimes co-terminus with the boundaries of the manor or vill, the two communities were identical, is clearly erroneous.

[7] This is the argument underlying the whole of Toulmin-Smith's book.

[8] Toulmin-Smith, The Parish 117, 118, 123, 124, 174 n.

[9] Vol. ii 405.

But the historical explanation of this fact is not quite so simple as the enthusiastic advocates of the claims of the parish imagined. We know more about the many varieties of community which flourished in the Middle Ages than was known when Toulmin-Smith wrote, and we have learned to distinguish between them. We can no longer confuse, as he confused, such separate units as township, tithing, leet, and parish. At the present day the better opinion is that the parish was originally a unit which was wholly ecclesiastical; and that it only gradually became a unit of the secular government in the last half of the sixteenth century.[1] In fact the secular parish is a post-Reformation phenomenon—a result of the new relations between church and state effected by the legislation of Henry VIII. and Elizabeth.

In order to understand the use which the state made of this old ecclesiastical unit in the sixteenth century, I must, in the first place, say a few words as to its character in the days when it was a purely ecclesiastical unit. In the second place, I shall deal with the manner and stages of the process by which it acquired secular functions, and with the character of the functions assigned to it. In the third place, I shall endeavour to explain why the Tudors adopted this ecclesiastical unit and turned it to secular uses, and to indicate the place which they assigned to it in their scheme of local government.

(*a*) The parish as a unit of ecclesiastical government.

Bishop Hobhouse defines the parish as a "community dwelling in an area defined by the church, organized for church purposes, and subject to church authority."[2] All the residents were parishioners, and all adult members, male or female, had a voice in its management.[3] The meetings of the parishioners took place in the church.[4] Here they chose their wardens, appointed committees,[5] audited their accounts, made orders as to the parish property, provided for the needs of the church furniture

[1] Hobhouse, Churchwardens' Accounts (Somerset Rec. Soc.) iv, *xv*; at p. *ix* he says, "the parish was a purely religious organization, distinct in its origin, its raison d'etre, its principles, its workings, and its aims from the manor or tything, though composed of the same personnel man for man;" P. and M. i 603; Maitland, L.Q.R. ix 227—"the germ of the Vestry is an ecclesiastical germ. The vestry belongs to the parish; and the temporal law of the thirteenth century knows nothing of the parish;" cf. Webb, Local Government, the Parish and the County 37 n. 6.

[2] Op. cit. xi. [3] Ibid. [4] Ibid.

[5] Ibid xviii, 208, 209, 223; Toulmin-Smith, The Parish, chap. iv; cf. Strype, Annales i 463, 464—in a paper written by a minister, there cited, it is said that, "To every Parish belongeth I A Parson or Vicar . . . II A Clerk . . . III A Sexton . . . IV Two Churchwardens . . . V Four or eight Jurats for offences given and taken—these, says Strype, seem to be a kind of censors or spies upon the manners of priests and people . . . VI Two collectors to gather for the poor . . . VII An Assistance, being thirteen persons, to consist of such only as had before been churchwardens and constables . . . VIII A Vestry of the whole Parish . . . IX Two Constables for the peace."

or fabric by the imposition of rates or by voluntary contributions. The duties of the parish with respect to the maintenance of the church furniture were enforced by the ecclesiastical courts;[1] when necessary, the duty of the individual parishioners to pay a rate was enforced by the same tribunals;[2] and their jurisdiction in these cases was recognized by the secular courts.[3] The secular courts also recognized the rights of the parishioners to choose and dismiss their officers,[4] the right of the churchwardens to hold the property necessary for the fulfilment of their ecclesiastical duties,[5] and their right to take measures for its protection.[6]

Thus in the Middle Ages the parish was a self-sufficing, self-governing ecclesiastical unit of a pattern not unlike those secular communities of manor, hundred, leet, and county, through which the local government of the county was conducted. Like them it was the centre of a vigorous independent life. In them the secular life of the community, in the parish its religious life, centred.[7] As with the secular communities, so with the religious community, we see it engaged in many activities which would have seemed strange to the lawyers of a later age.[8] Much property both real and personal was given to it by its members.[9] It farmed its own land, it managed its own live stock, its brew-house, its bake-house, and its church-house.[10] The church-house indeed was a source of considerable profit. It could be let;[11] and the church ale, at which food and drink made from the

[1] Hobhouse, op. cit. xi, xii.

[2] Ibid xii, xiii, xvi, xvii; but compulsion was, apparently, rarely needed; and most of the needs of the parish were met by voluntary contributions; at Bridgewater there is an instance of the levy of a rate by a majority vote.

[3] Y.B. 44 Ed. III. Trin. pl. 13 *per* Belknap; Jeffrey's Case (1590) 5 Co. Rep. 64b; Rogers v. Davenant (1675) 1 Mod. 194; Woodward v. Makepeace (1689) 1 Salk. 164; Newson v. Bawldry (1702) 7 Mod. 69, 70; cf. Register of Writs f. 44b—permission to proceed in the ecclesiastical courts against parishioners who have failed in their duty of repairing the nave of the church.

[4] Y.B. 26 Hy. VIII. Trin. pl. 25; (1611) 13 Co. Rep. 70; the King v. Morgan Rees (1697) 12 Mod. 116; Dawson v. Fowle (1664) Hardres 378, 379.

[5] Y.BB. 37 Hy. VI. Trin. pl. 11 *per* Moile; 12 Hy. VII. Trin. pl. 7; in the latter case it was held that, though they could hold chattels, they could not hold an interest in land for either a chattel or a freehold interest, nor could a use of land be vested in them; cf. also Y.B. 13 Hy. VII. Mich. pl. 5; but such property seems nevertheless to have been vested in them, and used for the profit of the parish, Hobhouse, op. cit. xiv-xvi and 173; however, the law for the future was laid down by the case of Henry VII.'s reign, cf. Toulmin-Smith, the Parish 267-269; for modifications made by equity see below 439-440; for inventories of the goods of the parishes see ibid 492-496.

[6] Y.BB. 11 Hy. IV. Mich. pl. 25; 37 Hy. VI. Trin. pl. 11; 8 Ed. IV. Trin. pl. 5; a case to the contrary Y.B. 19 Hy. VI. Pasch. pl. 10 seems to have been over-ruled; cf. the King v. Morgan Rees (1697) 12 Mod. 116 *per* Holt C.J.; Starkey v. Barton (1610) Cro. Jac. 234; the Churchwardens of Northampton's case (1691) Carth. 118; the parish of Yatten in 1489-1490 spent time and money in the prosecution of Davie Gibbs, who had stolen the parish property, Hobhouse, op. cit. xxiv.

[7] Above 152 n. 1.

[8] Vol. ii 377.

[9] Hobhouse, op. cit. xii, xiii.

[10] Ibid xiv-xvi, 173.

[11] Toulmin-Smith, The Parish 511.

parish stock was sold to the parishioners, was the mediæval counterpart of the modern charity bazaar or sale of work.[1] Through its officers or its committees it saw to the manufacture of the things needed for the upkeep or the ornamentation of the church,[2] and it supervised the fulfilment of the various purposes for which property had been given to it by pious donors.[3]

As with the secular communities of the land, so with the parish, in early days neither its boundaries, nor its membership, nor the machinery by which it performed its functions were very definitely ascertained;[4] and, as we shall see, the law upon these points has, in the case of the parish, remained uncertain down to quite modern times.[5] The reason for this continued uncertainty is, I think, to be found in the fact that the parish was in the Middle Ages a unit of the ecclesiastical government only;[6] and that for this reason its connection with the central government was less close, and its control by the central courts of law was weaker, than was the case with the units of secular government. The spheres of activity of the units of secular government and their powers and their duties, had been defined and regulated from the thirteenth century onwards.[7] The parish had not been subjected to this discipline; and when, with the growth of its secular functions, it began to appear more frequently before the courts of common law, those courts had few precedents to guide them. Thus, as each case arose for decision, they were free to interpret customary rules as they pleased, and to give effect to the local customs of particular localities.

But though the rules of law regulating the sphere of action and the machinery of the parish were, at the close of the Middle Ages, less definite than the rules regulating the sphere of action and the machinery of the secular communities, the parish had for that very reason continued to possess a more active and a more

[1] Hobhouse, op. cit. xxi, xxii; in the seventeenth century these church ales sometimes led to disorder, and the judges of assize, the Lord-Lieutenant, and the justices agreed that they should be suppressed; on the other hand some of the bishops supported them, see ibid App. B 245, 246; Toulmin-Smith, The Parish 496-506.

[2] "When books were wanted parchment was bought, a scribe was hired, a bookbinder fetched and furnished with material, clock weights and sheets of lead were cast on the spot;" and similar arrangements were made when it was necessary to make carved work or vestments for the church, Hobhouse, op. cit. xx.

[3] At Morebath (ibid 208-209) there were committees of from three to nine who controlled the church stock; they were elected by the Parish and accounted to them. There were also no less than eight separate "stores"—i.e. funds devoted to particular saints or religious or charitable purposes, each of which was separately audited; cf. Select Cases in the Star Chamber (S.S.) ii 270-276 for other specimens of these accounts.

[4] Webb, Local Government, Parish and County, 1-15, 32, 33, 37-40; Hobhouse, op. cit. xi.

[5] Below 158-160.

[6] Above 152.

[7] Vol. ii 396-400.

definite communal life and feeling.[1] As we have seen, the effect of the control of the common law was to weaken communal life and feeling, because the authority of the common law was substituted for the authority of the community.[2] Moreover, the fact that the parish was the owner of property further strengthened this communal life and feeling. In this respect parishes were more like the boroughs than the communities of the country at large;[3] and it is noteworthy that both the Year Books and the later cases sometimes say that, in respect of its ownership of property, the parish is a sort of corporation.[4] It is for these reasons that the parish remained an active community right down to the Reformation period; and it is in this fact that we can see one of the main reasons why the Tudor statesmen gradually adopted it as a unit of secular government. To the process by which this adoption was effected, and its extent, we must now turn.

(*b*) The parish as a unit of secular government.

So long as the old separation between the spheres of church and state lasted,[5] the parish remained a unit of ecclesiastical government.[6] It is not till after the Reformation that the state began to use it as an integral part of the machinery of local government. A brief chronological summary of the Tudor legislation will show us the stages of the process.

No one of the statutes of Henry VII.'s reign assigned any civil functions to the parish. It is noteworthy that a statute of 1496[7] which dealt with vagabonds and beggars—a subject with which the parish was brought into close connection by later legislation—made no mention of it. In a statute of 1529,[8] dealing with vagrants, it was mentioned along with hundreds, rapes, cities, boroughs, and liberties; but no specific functions were assigned to it. Two years later it was made responsible for the destruction of rooks and other vermin.[9] A statute of 1536 was the first statute to give it extensive functions in relation to the poor.[10] Parishes were to set beggars to work and to relieve the

[1] Hobhouse, op. cit. xx, xxi.

[2] Vol. ii 403-404. [3] Ibid 393.

[4] This was denied in Y.B. 19 Hy. VI. Pasch. pl. 10; but Y.BB. 37 Hy. VI. Trin. pl. 11, 12 Hy. VII. Trin. pl. 7 point the other way; in the King v. Morgan Rees (1697) 12 Mod. 116 Holt C.J. said, "they [the parish] are by law a corporation;" cf. Starkey v. Barton (1610) Cro. Jac. 234; Rogers v. Davenant (1675) 1 Mod. 194; Phillibrown v. Ryland (1725) 8 Mod. at p. 352 *arg.*; it appears from the case of Parishioners of Radclyffe, Bristowe, and others v. the Mayor of Bristowe (1543) Select Cases in the Star Chamber (S.S.) ii at p. 239 that several parishes in the City of Bristol had seals.

[5] Vol. i 587, 589-590; above 36-37, 81; below 200.

[6] Hobhouse, op. cit. xv n. 392-402. [7] 11 Henry VII. c. 2.

[8] 22 Henry VIII. c. 12.

[9] 24 Henry VIII. c. 10.

[10] 27 Henry VIII. c. 25; for the growth of the Poor Law see below 392-402.

impotent. The clergy were to exhort persons to give alms for this purpose, and the churchwardens and others were to collect these alms. For this purpose the churchwardens and four or six of the parishioners were ordered to appoint collectors, who must account to them once a quarter. The alms were to be kept in the common box of the church, and the parson was to keep the accounts. Contributions to these alms were entirely voluntary. Statutes of Edward VI.'s reign strengthened the connection of the parish with poor relief. Children were to be apprenticed;[1] and the enforcement of the principle that cities, towns, and villages were liable to relieve the paupers born there,[2] introduced the law of settlement. A later Act provided that registers of those needing relief should be kept by the parson and churchwardens; and that contributions should no longer be entirely voluntary—those who refused to contribute being made amenable to the jurisdiction of the ecclesiastical courts.[3] These duties were further enforced by a statute of Philip and Mary's reign;[4] and in addition the parish was made responsible for the highways.[5] Constables and churchwardens were to choose surveyors. On four days to be appointed by the constables and churchwardens the parish was to turn out with tools and carts and mend the roads. The leet and the justices of the peace were to enquire into defaults; and the surveyors were to account to the churchwardens.

The Elizabethan statutes relating to the poor law finally fixed the status of the parish as a unit of the secular government, and determined its relations to the other organs of that government. This legislation gave to the parish an organized machinery for the relief of the poor, and for raising rates to defray the cost of that relief; and it put that machinery under the control of the justices of the peace. This machinery was soon adapted to the enforcement of the other duties which were imposed on the parish in relation to the highways, the destruction of vermin, the notification of recusants, and the relief of disabled soldiers and sailors.

In the first of the Elizabethan statutes dealing with the poor law passed in 1563, the principle of compulsory contribution was retained; but the compulsion was no longer left to the ecclesiastical courts. The bishop was to present to the sessions those who refused to contribute; and the sessions were to assess their contributions.[6] A statute of 1572 gave the justices a larger control.[7] They were to make lists of impotent persons resident for the last three years in their districts, determine their place of settlement,

[1] 1 Edward VI. c. 3.
[2] 11 Henry VII. c. 2 § 2; 22 Henry VIII. c. 12 § 3; 27 Henry VIII. c. 25 § 1; 1 Edward VI. c. 3 § 6; 3, 4 Edward VI. c. 16 § 5.
[3] 5, 6 Edward VI. c. 2.
[4] 2, 3 Philip and Mary c. 3.
[5] Ibid c. 8; continued and amended by 5 Elizabeth c. 13.
[6] 5 Elizabeth c. 3.
[7] 14 Elizabeth c. 5.

estimate the cost of maintaining them, assess the inhabitants, and appoint collectors. They were also to appoint annually to the office of overseer, a new office created by the statute for the supervision of the work of rogues and vagabonds.[1] In 1574[2] two justices were given power to make bastardy orders in order to relieve parishes burdened by pauper bastards; and provision was made for the maintenance by the parish of a stock of wool, etc., on which the collectors, and officers to be called the governors of the poor, were to set the poor to work. Those who refused to work were to be sent to the houses of correction established by the same Act. In 1597,[3] and 1601[4] came the two Acts upon which the Poor Law rested for many centuries, and on which to a large extent it still rests. The churchwardens and four substantial householders were to be nominated overseers of the poor under the hand and seal of two or more justices resident near to the parish.[5] These overseers must apprentice children, employ paupers, build houses for them, and raise rates; and every month they must account to two justices. Persons aggrieved by the manner in which they were assessed could appeal against the assessment to quarter sessions. Parents were made liable to maintain their pauper children and children their parents. Another Act of 1597[6] enforced the obligation of the parish to maintain its own poor. Wandering rogues were to be sent to their parish of birth or last settlement.

The parish thus became the unit for the assessment of rates, and acquired an executive staff which, under the control of the justices, made the assessment and administered the machinery for the relief of the poor. But obviously a unit of rate assessment, and an executive staff which collects rates, will soon be used for the collection of many other rates; and a machinery which can administer the poor law can also administer other things. Thus in Elizabeth's reign the parish collects rates for the repair of the highways,[7] for the destruction of vermin,[8] for the relief of prisoners,[9]

[1] Some have supposed that this office can be connected with the earlier collectors or distributors of parish alms, see Webb, Local Government, the Parish and County 30 n. 3; but the connection seems slight. It was not till 1597 (39 Elizabeth c. 3 below 397) that these overseers became definitely the overseers of the poor of later law.

[2] 18 Elizabeth c. 3. [3] 39 Elizabeth c. 3. [4] 43 Elizabeth c. 2.

[5] Toulmin-Smith maintained that the parish chose the overseers, and that the functions of the justices were limited to the approval of those so chosen, The Parish 150, 151; but this seems doubtful, see Webb, Local Government, the Parish and the County 31; but, as Webb says, loc. cit. n. 1 probably the justices "were only too glad to get anyone willing to serve. Even poor labouring men, temporary inhabitants, and women, were held to be eligible if no more suitable persons were available. Thus it came about that in most places the retiring overseers nominated their successors."

[6] 39 Elizabeth c. 4. [7] 18 Elizabeth c. 10. [8] 8 Elizabeth c. 15.

[9] 14 Elizabeth c. 5 § 38, 39 Elizabeth c. 3 §§ 12, 13.

and for the relief of disabled soldiers and sailors.[1] The Elizabethan legislation which gave the parish the position of the rateable unit of the county, and a machinery for rate assessment and other governmental functions, assured to it a permanent position as a unit in the local government of the country.

But when the parish had attained this position it was inevitable that it should attract to itself some of the functions of the older communities into the place of which it had stepped. As early as Henry VIII.'s reign the constable was beginning to be associated with the parish rather than with the township or tithing;[2] and by the end of the century he had come to be its most important executive official.[3] In the eighteenth century we sometimes find it issuing orders as to rights of common, or as to sheep or cattle, which in earlier days would have been issued by a manorial court.[4] The possession of such officials as a Hayward, a Common Driver, a Neatherd, or a Hogwarden would seem to show that it was assuming some share in the regulation of the common field system of agriculture;[5] while such officials as an Aleconner, a Scavenger, or a Bellman would seem to show that it was assuming some of the duties and adopting some of the officials of the leet.[6] That the parish was thus able to step gradually into the place of some of these older communities is evidence that it was a community which had inherited a good deal of their spirit. In its somewhat indefinite powers to make by-laws and to impose rates,[7] in its powers to compel the unpaid services of its members as its officials,[8] it carried on, right down to modern times, some of the characteristics and some of the traditions of the older communities, through which the local government of the country had been carried on from before the time of legal memory.

Thus in addition to its ecclesiastical functions the parish acquired a large number of statutory civil functions and a few new officials. Its ecclesiastical functions and officials, and its statutory civil functions and officials, were much the same all over the country. But in some places more, in some places less, the assumption by it of the duties and officials of some of the older communities introduced some variations. Still greater variations

[1] 35 Elizabeth c. 4; 39 Elizabeth c. 21; 43 Elizabeth c. 3.

[2] 22 Henry VIII. c. 12 § 3—Parishes were to be fined for the negligence of their constables.

[3] Webb, Local Government, the Parish and County 25, 26; above 124.

[4] Toulmin-Smith, The Parish 526, 528.

[5] Webb, op. cit. 34. [6] Ibid.

[7] Y.B. 44 Ed. III. Trin. pl. 13; Chamberlain of London's Case (1591) 5 Co. Rep. 62b; Jeffrey's Case (1590) 5 Co. Rep. 64b; Newson v. Bawldry (1702) 7 Mod. 69, 70; Webb, Local Government, the Parish and County 39.

[8] Webb, op. cit. 15 and n. 2, 16; 40, 41.

were caused by the differences in the size of different parishes, and the differences of environment in which its duties were performed. Thus we are not surprised to find that many different forms of government were developed by different varieties of parish.[1] This was possible because the Tudor legislation left the parish very free to manage its affairs in its own way, subject to the supervision of the justices of the peace; and, in the absence of fixed rules, local customs adapted to the needs of any given locality could easily grow up. We have seen the courts were not fettered by many precedents on questions of parish government. They were therefore free to sanction these local customs, and, if they were reasonable, they generally did sanction them.[2] This process was further helped by the somewhat nebulous position of the Vestry or meeting of the parishioners under the Tudor legislation.

In the Middle Ages, when the parish was an ecclesiastical unit, the general rule was that all parishioners could take part in the parish meeting held in the vestry; and that this open vestry was the normal type of vestry continued to be the presumption of the common law, after the parish had acquired its civil function.[3] But, under the Tudors, the powers of the vestry were of a somewhat shadowy kind—so shadowy that the question who was entitled to take part in it was never precisely defined.[4] All the real power was vested in the officials and the leading men of the parish, who performed the various functions of the parish under the supervision of the justices of the peace.[5] It is clear that this state of things will somewhat easily lead to the rise of the Close Vestry. Customs which restricted the vestry to the officials and the leading members of the parish were allowed to be proved

[1] Webb, op. cit. Bk. i chaps. ii, iii, and v.

[2] Ibid 175-190—as Webb says at pp. 175, 176, "a large part was played by local custom in the organization of the ordinary parish; the 'ancient usage' of the locality was suffered by the law courts to modify, and even to contradict, the plain directions of the common law, and, occasionally, of express statutes; it could vary the number, method of selection, and area of jurisdiction of all the parish officers, not merely of such old-world functionaries as Constables and Churchwardens, but also of such modern statutory creations as Overseers of the Poor and Surveyors of Highways."

[3] Hobhouse, op. cit. xi; Toulmin-Smith, The Parish 237-240; cf. Phillibrown v. Ryland (1725) 8 Mod. 52, 351.

[4] Webb, op. cit. 38-40; "what we may call the membership of the parish was as indeterminate as its boundaries. Both law and custom assumed that the inhabitants of a parish were those who were reputed to 'belong' to it. Whether by this was meant all who actually resided in the parish, or those who owned or rented lands or houses within the parish . . . or merely the heads of households, or the adult men only, or those only who possessed what was called a legal settlement in the parish, was never generally determined by law, and differed according as different rights or obligations were in question. . . . As for the right to be present at the vestry meetings, and thus to take part in the government of the parish, it had apparently never been thought of sufficient importance to obtain either statutory or judicial decision," ibid 14, 15.

[5] Ibid 39, 40.

somewhat easily by the courts.[1] In fact, as we shall now see, the place assigned to the parish in the Tudor scheme of local government tended to make such customs seem eminently reasonable.

(*c*) The reasons why the Tudors adopted the parish as a unit of secular government, and the place which they assigned to it in their scheme of local government.

I have already indicated one reason why the state adopted this ecclesiastical community as the primary unit of the machinery of local government. We have seen that, unlike the older communities of township and manor, of hundred and county, the parish still retained a vigorous and an active life.[2] Moreover, in the sphere of civil government, it was a new community. The common law had not as yet acquired many detailed rules concerning it; and for that reason it could be the more easily moulded to suit the new needs of the modern state.[3]

The functions which the state entrusted to the parish will supply us with another reason why it was thus adopted by the state. The multifarious business of the growing Poor Law, if it was not the earliest, was certainly by far the most important of these functions.[4] Now the parts of the Poor Law which related to the relief of the impotent and the apprenticing of children were clearly allied to those works of charity with which the church had always been connected. Though it may be that works of charity did not figure prominently in the activities of the mediæval parish,[5] they had always been encouraged, as the wills of the period show,[6] by the mediæval church. Some of the funds of the monasteries and the gilds had been devoted to such charitable purposes as the relief of the poor, and education.[7] The disappearance of these funds combined with agricultural and industrial changes[8] to render the problem of poverty still more pressing. The character of some of the measures needed to alleviate the prevailing distress suggested an ecclesiastical organization as an appropriate channel of relief, while the magnitude of the problem necessitated a national scheme controlled by the state. The original connection with the church grew weaker, and the state control grew stronger as the century advanced, till, in the last years of Elizabeth's reign, the main principles of the Poor Law were evolved.[9] Contribution for the relief of the poor

[1] Webb, op. cit. 176-181. [2] Above 154-155. [3] Above 159.
[4] Above 156-157. [5] Hobhouse, op. cit. xiv.
[6] Vol. iii 545-546; and cf. Toulmin-Smith, The Parish 95, 96, citing Edward VI.'s Injunctions 1547, Cranmer's Articles 1548, and Elizabeth's Injunctions 1559.
[7] The Complaint of Roderick Mors (E.E.T.S.) pp. 33-34; cf. Aske's evidence (1537) L. and P. xii *i* no. 901 pp. 405-406; Ashley, Economic History ii 312-332; below 389-390.
[8] Above 153-154; below 389-392. [9] Above 156-157; below 392-398.

was made compulsory, and a machinery for levying the necessary rates and for administering the poor law was created and grafted on to the organization of the parish. But, as we have seen, a machinery which can levy poor rates, relieve the poor, apprentice children, and maintain houses of correction can levy rates for other purposes, and can perform other administrative duties. It can be asked to look after the highways, to destroy vermin, to relieve distressed soldiers and sailors;[1] and, when once this administrative machinery had been tried and found to work successfully, there was another very cogent reason for still further adding to its functions.

The machinery of the parish thus adapted by the state to its own needs supplied exactly the element which was wanting to the organization of local government under the justices of the peace. The organization of the justices of the peace was well suited to the conduct of their judicial duties. It was suited also to the conduct of such administrative work as could be done under the judicial forms, either of presentment, or of applications made to them as a judicial or a semi-judicial board. They could, for instance, punish criminals, deal with negligent officials, and order things to be done to which their attention had been called, because all such matters could be brought before them by the presentment of a jury or by the application of an aggrieved person.[2] But for the purely administrative business of levying rates, looking after the poor, or repairing highways, a body of officials was needed which could act continuously on its own initiative. A body was wanted which could administer, and not merely punish failures to administer. But the officials who were competent to do this must be persons who were in touch with small districts, and with the individuals who inhabited those districts. The parochial officials had these qualifications. And it is not too much to say that it was the fact that the justices of the peace could rely upon an organization of this character, which made the development of their administrative powers possible, and enabled them to deal with the county business as efficiently as they dealt with their judicial work. Already in Elizabeth's reign we can see that the organization of the parish is being used in this way. Its rating machinery was used to levy the rates for the relief of prisoners, and of distressed soldiers and sailors, which were paid over to specially appointed treasurers and distributed by the justices.[3]

Now it is clear that the character of the functions thus

[1] Above 157-158. [2] Above 136, 142-144.

[3] 14 Elizabeth c. 5 § 38; 18 Elizabeth c. 4; 39 Elizabeth c. 21; 43 Elizabeth c. 3; cf. 1 James I. c. 31—rates for the relief of those suffering from plague.

assigned to the parish made it impossible that they should be discharged by a large parish meeting. They necessarily fell to be performed rather by the officials of the parish and its leading members, than by the parish as a whole; and doubtless it was partly for this reason that we find that close vestries tended to grow up, and that the courts were somewhat ready to presume the existence of the immemorial usage needed to give them legal validity.[1] But these officials, in whom so many powers were vested, were the officials of the parish; and the members of the vestry, open or close, represented the parish. In fact these officials stood to the parish in somewhat the same relations as the justices of the peace stood to the county. The organism of the parish was at the back of the parish officials—the constable, the churchwardens, the overseers, and the surveyors of highways —just as the organisms of the counties and the hundreds were at the back of the county justices, and the organism of the boroughs at the back of the borough justices. Thus organic and semi-corporate units, reminiscent of the mediæval scheme of local government, formed a background to the new system of local government. Moreover, the men who were responsible for the conduct of this new system possessed that local knowledge and local patriotism, and the system itself possessed that capacity for educating the citizen in the art of administration, which were the strong features of the mediæval regime. The weak point in that regime in the later mediæval period had been the absence of adequate central control and supervision.[2] But we have seen that this defect had, to a large extent, been remedied by the extension of the control over the justices of the peace exercised by the Council and its branches, by the lord-lieutenants, and by the judges of assize.[3] Similarly, an adequate control over the parochial officials was provided by giving the justices of the peace somewhat the same position in relation to them as the central government had assumed in relation to the justices of the peace.[4] In both cases an effective control was exercised; but

[1] Above 159-160; Webb, op. cit. 176.

[2] Vol. ii 414-418; vol. iii 389-390.

[3] Above 71-80.

[4] Thus the offences of the humbler officials could be brought before them by way of indictment, or the officials could be controlled by direct orders, see J. Lister, West Riding Sessions Rolls xv 207 for an indictment against a high constable in 1599—he was charged with receiving money for purveyance and not paying it over, with collecting money for training soldiers and not paying it over, with charging excessive rates to the amount of £30, with levying more soldiers than were required for the musters and discharging them for payment, with collecting money to amend a highway out of which he disbursed little, left the labourers unpaid, and the road no better than it was before; ibid xxviii for an account of the different orders made by the justices; cf. North Riding Sessions Records i 15 (1605)—a high constable is suspended; 103 (1607-1608)—a controversy as to the appointment of a constable at Malton; ii 87 (1615)—orders as to assessment; 181, 182, 183 (1609-1610)—similar orders; Worcester County Records ii *xlvii* (1627)—complaints against a high constable.

in neither case was the control of the higher authority extended so far as to deprive the lower authorities of all initiative and all discretion. The power of the controlling authority was strengthened; and, considering the large number of new powers entrusted to the authorities responsible for the conduct of the local government, it was necessary that it should be strengthened. But it was not strengthened to such a degree that the units of the local government ceased to be self-governing. But of this distinguishing characteristic of the English system of local government I must say something more in the following section.

(iv) *Characteristics and Tendencies of the New System of English Local Government.*

In some respects the development of the institutions of English local government is parallel to the development of similar institutions in the principal states of Western Europe. In England, as elsewhere, the mediæval communities and the mediæval officials, through whose agency the work of local government had been carried on in the fourteenth and fifteenth centuries, were not sufficient for the needs of the sixteenth century. Legal control was weak, because there were no rules of law sufficient for the guidance of the units of local government in a modern state. Political control was weak because the recrudesence of feudal disorder had almost eliminated the authority of the central government. The machinery itself was unable to perform the many new tasks which the many fundamental changes of this century had laid upon it. In England as elsewhere these three defects were supplied by the growth of a strong executive government. The Council restored the authority of the law, controlled the working of the local government, and devised more efficient machinery for the performance of its duties old and new.[1] In these respects the English development was similiar to the continental development.[2] But in spite of this amount of similarity, it is the dissimilarities which are the most striking and the most fundamental; and it is in these dissimilarities that we can see the most important of the characteristics of the English system of local government.

(*a*) We have seen that abroad the central government was able, in the last resort, to rely upon a standing army.[3] The English Council had no such resource; and it was therefore dependent in the last resort upon the good-will of the governed.

(*b*) The instruments through which the English Council worked were quite unique. Abroad, as we have seen, there was a tendency throughout the sixteenth century to substitute for

[1] Above 71 80, 137 seqq. [2] Above 109-111. [3] Above 110.

the older self-governing authorities a set of delegates, who acted under the orders of the central government, who were amenable only to its control, and who were largely exempt from ordinary rules of law.[1] In England, on the other hand, the position was very different. From the latter part of the twelfth century a strict control had been exercised by the Curia Regis and its offshoots over the self-governing communities of the early mediæval period. This control had made it possible for the state to use these communities in the fourteenth and fifteenth centuries as an integral part of a new system of local government founded upon the justices of the peace. In the sixteenth century the Tudors made these justices the chief officials of their system of local government; and it was due to the manner in which they were controlled and supervised by their Council that they were able to assume the control over the local government of a modern state, to act on their own initiative as administrators, and to supervise the humbler officials. In England, as abroad, power tended to be vested in officials rather than in communities; and the increased complexity of the problems of government made this change inevitable. But in England these officials were not wholly new officials who were simply the delegates of a central board. They were mediæval officials who were closely connected with the older communities; and they had behind them the traditions of the time when these communities were self-governing units. Their powers were flexible like the powers of these communities. They acted through the agency of the older officials of the county, and, in respect of a large part of their work, through the mediæval judicial forms.[2] They were bound by the ordinary rules of law; and though the central government issued orders in special cases, and gave general advice or directions either immediately or through the judges of assize, they were free, subject to that control and to the control of the law, to act as they pleased in the execution of their authority. The officials of the parish, old and new, were, in their humbler sphere, in somewhat the same position;[3] and we have seen that the justices stood to the machinery of the parish and its officials in a relation somewhat similar to that in which the Council stood to them.[4] It is true that in London, and in those parts of England which were subject to the jurisdiction of provincial Councils, the control of the central government was closer; but it never became so close as to render the justices merely its subordinates and agents—a fact which was recognized by the Council itself.[5] The continental system was comparatively simple

[1] Above 110-111.
[2] Above 142-143.
[3] Above 144.
[4] Above 162.
[5] See D'Ewes, 75 (1562-1563), the Lord Keeper warned members of the House of Commons to see that the laws were executed, "Lest her Grace should be driven

and symmetrical; and in time it produced a trained civil service. The English system was complex; but it was understood by the people at large, because it had developed gradually from century to century; and it taught the people at large to govern themselves, from the humbler classes who were obliged to serve as constables, surveyors, overseers, or churchwardens, to the higher classes who were obliged to serve as lord-lieutenants, sheriffs, or justices.

(*c*) It will thus appear that, while abroad the officials through whom the local government was conducted were subject simply to the control of the central executive authority, in England they were subject both to the central executive authority of the Council and its branches and to the ordinary law administered in the ordinary law courts. As the century advanced the control of the Council tended to become more detailed and more regular—it is always the tendency of a strong centralized institution of this sort to assume gradually greater powers, and to become arbitrary in their exercise. On the other hand, the internal peace which the Council had secured enabled the courts of common law to adapt themselves to the new conditions. They were able to evolve new principles, and to give a new point to old principles; and the direct consequence of these principles was a claim to a larger share in the control of the activities of all the officials through whom the local government was conducted.[1] It is clear that these two forms of control, so fundamentally dissimilar, will be bound sooner or later to conflict.

The issue of that conflict, it was clear, would be doubtful. To those who looked only at the strength of the Tudor Council, at the extent of the powers exercised by it, and at the continental analogies, it might appear that the Council would have an easy victory. But, as we have seen, to look only at these things was to take a false view of the real position. The coercive authority of the English Council was comparatively weak; and the English system of local government, by educating Englishmen of all classes to exercise political authority, caused them to be impatient of too much control by a centralized board. These were important factors in the situation. But the most important factor of all was

to do, as she doth in her ecclesiastical Laws, make Commissions to enquire, whether they be done or not;" cf. ibid 153, 154 for similar warnings; L. and P. x no. 245—an argument to prove that it would be a mistake to introduce government by justices of the peace into Wales—the contrast between government by "King's commissioners" and justices of the peace is clearly put, and the latter system is clearly recognized as a system of self-government; ibid xii *ii* no. 186 (38)—a petition to the king (among the Darcy papers) against government by commission. Among Cromwell's Remembrances for 1539, L. and P. xiv *i* no. 643, is a proposal which seems to contemplate a scheme of government by semi-military commissioners throughout England.

[1] Above 75-76; below 188, 274.

the growth, at the end of the century, of the independence of Parliament. All through the century the legislative power of Parliament had put some limits to the power of the Council to issue any orders that it pleased;[1] and, at the end of Elizabeth's reign, this legislative power was not so much under the control of the executive as it had been in the reign of Henry VIII.[2] It is clear that the limitation upon the authority of the Council, involved in the existence of this power, will be a valuable weapon in the hands of judicial courts, desirous of establishing their claims to exercise a rival control over the conduct of the local government on strictly legal principles.[3] Thus, by the side of the system of centralized administrative control exercised through the Council and its branches, there was growing up simultaneously an opposition to that control. Parliament must be consulted before any departure was made from ascertained rules of law, and its consent was by no means a matter of course. The ordinary courts of law claimed to pronounce upon the validity or invalidity, not only of the acts of the officials of the local government, but sometimes even of the acts and orders of the Council itself.[4]

Parliament and the ordinary courts of law were old allies;[5] and I must now endeavour to describe the unique position in the English state which the continuance of this alliance enabled them, during this century, to claim.

II. The Representative Assemblies and the Central Courts of Law

In many of the countries of Western Europe representative assemblies were to be found in the thirteenth and fourteenth centuries. The Cortes of Castile and Aragon and the Estates General of France were not unlike the English Parliaments of those centuries. The Cortes of Castile and Aragon controlled taxation and legislation, and sometimes seem to have exercised supervision over all the business of the state.[6] The powers of the Estates General were somewhat more limited. Ordinarily they seem only to have had the right to control taxation, and the right to give counsel to the King.[7] But, with the one exception

[1] Above 99-104.
[2] Above 90; below 190.
[3] Below 188, 274.
[4] Above 85 n. 5; below 188 n. 2.
[5] Vol. ii 430-434.
[6] Hallam, Middle Ages ii 24-33, 55, 56.
[7] Esmein, Histoire du droit Francais 568 seqq.: Brissaud, Histoire du droit Francais 805, 806. Sometimes they exercised extraordinary powers, e.g. in 1355-1357 they controlled the administration, and in 1420 they ratified the treaty of Troyes; they also claimed certain rights of election to the throne in case of a vacancy, certain rights during the minority of the King, and certain rights of sanctioning alienation of the royal domain, Esmein, op. cit. 565-568; but these claims were shadowy—on such matters they did little more than deliberate; their ordinary rights were those stated in the text.

of the English Parliament, these representative assemblies failed to stem the tide of absolutism in the sixteenth century, and survived, if they survived at all, merely as the shadows of their former selves. The Castilian Cortes, after the revolt of the *communeros* (1520-1521) became completely subservient to the king, who bribed or nominated its members.[1] After 1591 the Cortes of Aragon were similarly muzzled.[2] The Estates General lost their powers earlier. The stress of the hundred years' war induced them to vote permanent taxes to keep on foot a paid army (1435 and 1439); and they tried in vain to regain their lost control over taxation.[3] By the second half of the sixteenth century their consent or their refusal to consent to a new tax was a matter of no importance. They never acquired a power to legislate. They could advise, complain, or petition; but that was all.[4] The right to petition did not, as in England, develop into a right to consent to, to refuse to consent to, or to propose new laws.[5] The king was free to act or not as he pleased upon their petitions.[6] These petitions, it is true, often supplied valuable material for the making of laws; but, as in England in the fourteenth century, it was the king who made the laws.[7] Even though their powers were thus diminished, they were distrusted. Their existence gave countenance to democratic claims, which assorted ill with the position which the monarchy had assumed.[8] After 1614 none were assembled till the eve of the Revolution.

The reasons why these representative assemblies failed to become a permanent check upon the king, and a permanent part of the constitution were mainly two. In the first place, their constitution and procedure were defective. In the second place, they excited the hostility of the lawyers, because the position which the lawyers claimed for the law courts seemed to be threatened by the claims of these assemblies.

[1] Ranke, Turkish and Spanish Monarchies (Kelly's Tr.) 56-58; in 1534 it was said that a place in the Cortes was worth 14,000 ducats; after 1538 the nobles were never summoned.

[2] Ibid 64, 65.

[3] Esmein, op. cit. 569-573.

[4] Ibid 573-575.

[5] Vol. ii 435-440.

[6] "Le roi était libre absolument de repousser les demandes ou d'y accéder; c'était une supplique qui lui était addressée," Esmein, op. cit. 575; under Philip II. the position of the Cortes in relation to the King was very similar, Ranke, op. cit. 59, 60.

[7] Hence, as in the English Parliament, we get complaints that, "Le pouvoir royal dénaturait les articles des cahiers;" cp. vol. ii 439.

[8] Hotman, Franco-Gallia (Ed. 1573) cc. xv-xviii argues from the history of the Estates General, as English statesmen argued from the history of the English Parliament, that the French monarchy was not absolute—"Utcumque sit, perspicuum est, nondum centisimum annum abiisse ex quo Francogalliæ libertas, solemnisque concilii auctoritas vigebat, et vigebat versus regem [Louis XI] . . . tanta imperii magnitudine praeditum, quantam nunquam in ullo rege nostro fuisse constat;" cp. H. Lureau, Les doctrines democratiques de la seconde moitié du XVIe siècle 5-10, for instances of claims to the exercise of various powers made by or for the Estates General in the fifteenth and sixteenth centuries.

(1) The constitution of these assemblies was defective. The nobility and the *tiers état* sat separately. Either the nobility were not summoned; or, if they were summoned, they failed to attend, as in Castile;[1] or, if they attended, they failed to act with the *tiers état*, because their interests were too divergent. Thus in France the exemption of the nobility from the *taille* caused them to take little interest in the struggle to gain control over taxation.[2] The procedure of these assemblies was even more defective. Their activities were seriously limited by old rules which were survivals of a very primitive stage in the history of law. Thus in Aragon, till 1591, the principle that a decision could be arrived at by a majority vote was unknown—a single dissentient could prevent the levy of a tax or the passing of a law.[3] The modern sovereign state has many points of similarity to very primitive man. This rule was obviously based upon much the same reasons as have made it necessary to provide that, generally, the decisions of both the Assembly and the Council of the League of Nations shall be unanimous.[4] Both in France and in Castile it would seem that, without express powers from their constituents, the deputies could do nothing except present grievances.[5] These rules represented archaic legal ideas which were being rapidly driven from the legal systems of the principal states of Europe by the victorious advance of Roman Law, and the consequent increase in the coercive power of the state.

(2) The preservation of these archaisms partially explains the hostility of the lawyers. The order of legal ideas with which the lawyers of this age of the Reception were familiar was very different from the order of legal ideas which these assemblies represented. But the cause for this hostility really went deeper than this. In many countries, and notably in France, the claim

[1] Ranke, op. cit. 56, 57.

[2] Esmein, op. cit. 620; in Spain there was a long-standing feud between the towns and the nobles, Ranke, op. cit. 56.

[3] Ibid 65; it was enacted in 1591 that for the future, "the majority of every estate constitutes the estate; even if a whole estate be wanting this shall have no influence upon the constitution of the Cortes, provided that the same shall have been duly summoned according to law;" and see generally as to the Cortes of the Spanish Kingdom in the later Middle Ages, R. B. Merriman, 16 Am. Hist. Rev. 476-495; for some account of the history of the majority principle see Redlich, The Procedure of the House of Commons ii 261-264; vol. ii 431 and n. 4.

[4] "At the present stage of national feeling, sovereign states will not consent to be bound by legislation voted by a majority, even an overwhelming majority, of their fellows," cited Pollock, League of Nations 103-104.

[5] Esmein, op. cit. 559, "Les députés aux Etats généraux étaient, quant à leurs pouvoirs, soumis au régime qu'on appelle le *mandat impératif*. . . . Plus d'une fois les députés répondirent aux demandes royales que celles-ci excédaient leurs pouvoirs, et il fallut les renvoyer devant leurs electeurs pour en recevoir de nouveaux;" for a similar rule in Castile see Ranke, op. cit. 58—Charles V. got over it by dictating a comprehensive form of credentials which must be given to all deputies; for similar and greater defects in the German diet see Camb. Mod. Hist. i 290, 291.

of the central courts to exercise political functions made them the rivals of these assemblies.[1] As Mr. Armstrong has said, "The jealousy between judicature and legislature has been a prominent rock of offence in the pathway of French constitutional liberty."[2] But in order to understand this cause for the jealousy of the lawyers I must explain the constitutional position which they claimed for some of these central courts.

Our own constitutional history teaches us that courts of law were, in the days before the functions of government had become specialized, very much more than merely judicial tribunals. In England and elsewhere they were regarded as possessing functions which we may call political, to distinguish them from those purely judicial functions which nowadays are their exclusive functions on the continent, and their principal functions everywhere. That the courts continued to exercise these larger functions, even after departments of government had begun to be differentiated, was due to the continuance of that belief in the supremacy of the law which was the dominant characteristic of the political theory of the Middle Ages.[3] The law was a rule of conduct which all members of the state, rulers and subjects alike, were bound to obey. The whole conduct of government consisted in the enforcement of the law, and in the maintenance of the rights and duties to which it gave rise. It was a necessary consequence of this theory of government that the court should possess political functions; for they existed not merely to do justice as between private persons, but also to see that the law itself was not arbitrarily infringed or altered by the king or any other person.

The two most striking illustrations of the political powers possessed by these mediæval courts are the Justiza of Aragon and the Parlement of Paris. Both possessed large powers which were designed to safeguard the supremacy of the law, and to preserve to the individual the rights which it gave him.

[1] Esmein, op. cit. 570-571, tells us that in 1484 the Parlement of Paris turned a deaf ear to the request of the duke of Orleans that it would assent to the principle that the taxes should not be increased without the consent of the Estates—"C'est qu'il s'agissait des Etats généraux, c'est à dire d'un pouvoir politique en partie rivale, dont les parlements contrarièrent incontestablement le développement et auquel ils cherchèrent à se substituer;" cp. Armstrong, French Wars of Religion 15, 24, 25 for the events of 1566.

[2] Op. cit. 15.

[3] Vol. ii 131-132, 195-196, 252-256, 441-443; above 21-22; Esmein, speaking of the Parlement of Paris (op. cit. 426), says, "Quoique le parlement rendit ses sentences au nom du roi, source de toute justice, dans les arrêts qu'il prononçait, c'était la cour qu'on faisait parler (*la cour ordonne, condamne*) tandis que, dans les arrêts du conseil du roi, le roi parlait toujours en personne (*par le roi en son conseil*)," —this very neatly expresses the contrast between the ideas which underlay the jurisdiction of the older courts, and the ideas which underlay the jurisdiction of the newer courts of the sixteenth century; cp. vol. i 40 for the same idea in England that it is the court which gives the law.

The Justiza held his office for life, and was responsible only to the Cortes. He could prohibit any inferior court from proceeding with a case. He was the final judge on points of law arising in all other courts. By the process of *Juris-firma* he could bring any case pending in the lower courts before himself: by the process of *Manifestation* he could bring before himself any person imprisoned, that he might adjudicate upon the justice of the charge made against him. He administered the coronation oath to the king; and often represented him in the Cortes. These powers were evidently designed to protect the subject against any infringements of the law.[1] They existed till the revolt of Saragossa in 1591. After that date the Justiza and his deputies became practically nominees of the king.[2] The new idea that the king's will was law triumphed over the mediæval idea and the mediæval institution invented to safeguard it.

The Parlement of Paris is a more famous illustration of the same idea. By the end of the thirteenth century it had become a regular court of justice split up into several divisions—the Grande-chambre, the Chambre des Enquêtes, the Chambre des Requêtes, and the Chambre de la Tournelle.[3] But besides this it regarded itself as the guardian of the fundamental laws of the state;[4] and because it possessed these functions it was praised by Machiavelli as one of the wisest of French institutions.[5] In the sixteenth and seventeenth centuries the reason for their existence was the subject of many conflicting theories.[6] In truth it cannot be understood unless we remember the mediæval ideas as to nature of law, and as to the relation of the law to the court which administered it.

The methods in which it exercised this power were various. In the fourteenth and fifteenth centuries it was sometimes consulted by the king along with the Council;[7] then and later constitutional questions were sometimes submitted to it;[7] it could take action against offenders against the state;[7] it could make

[1] Hallam, Middle Ages ii 48-55.

[2] Ranke, Turkish and Spanish Monarchies 64, 65; Camb. Mod. Hist. iii 516, 517.

[3] See Esmein, op. cit. 409-426 for its origins; ibid 427-434 for its organization, and the description of the functions of these different divisions.

[4] "Ils se disaient en particulier les gardiens de *lois* fondamentales ou *principes fondamentaux* de la monarchie. On entendait par là certaines règles de droit public, considérées comme si essentielles que le roi lui-même pleinement investi du pouvoir egislatif, ne pouvait y deroger," ibid 582; certain of these laws, such as the descent of the crown and the inalienability of the royal domain, were enumerated; but, beyond that, they asserted that the principle that the monarchy was not absolute but limited was a fundamental law,—"seulement ici on tombait dans le vague et les parlements avaient beau jeu;" for the very different history of this idea in England see vol. ii 441-446.

[5] Il Principe, cap. xix.

[6] For these theories see Brissaud, op. cit. 884.

[7] Esmein, op. cit. 583-585.

supplementary rules and regulations as to matters which fell within its jurisdiction.[1] But the most important of all these methods was that of remonstrance, and of refusing to register laws submitted to it by the king.[2] It was this last power which for a long time moderated the absolute character of the French monarchy; and it remained at intervals an obstacle to the crown right up to the end of the *ancien régime*.[3]

The manner in which the Parlement was composed would seem at first sight to render it an efficient guardian of the law. In France, as in England,[4] property and office were confused. Its members were a body which were practically irremovable, because they had bought their seats, and because they could hand them on to their nominees.[5] But in reality this was a source of weakness. They were a close oligarchical body.[6] They were often corrupt.[7] It was only occasionally and by accident that they commanded the confidence or sympathy of the public. Another source of weakness was the fact that the king had never ceased to exercise extensive powers over the court. He could not only control the conduct of or the decision in a case,[8] he could also personally intervene. If the king came down in person and held a "*lit de justice*," he could force the Parlement to act as he pleased,[9] while it was always possible to intimidate or punish its members, and sometimes to disregard it entirely.[10] If he did not exercise these powers, and allowed a modification made by the Parlement, he could take credit for his moderation; and this tended to make the rights of the Parlement look as if they were dependent merely upon his pleasure.[11] Again in later times, when provincial Parlements were multiplied, all of them claimed the same rights of refusing to register a law. Thus a law might be in force in some parts of the country and not in others.[12] Thus it happened that,

[1] "Arrêts de règlement," ibid 593-595. [2] Ibid 585-593.

[3] See ibid 595-607; and Brissaud, op. cit. 885-887 for an account of the chief occasions on which this right was exercised.

[4] Vol. i 246-248.

[5] Esmein, op. cit. 451-464; as he says at p. 461, "Il assura à la magistrature une pleine independance; et sans lui, les résistance politiques des parlements aux XVIIe et XVIIIe siècles ne se comprendraient pas."

[6] Ibid 458-459.

[7] Ibid 460-464—they had bought their places and wanted to see their money back; cp. vol. i 424-425, 439-442, for similar abuses in the Chancery.

[8] Esmein, op. cit. 485-494. [9] Ibid 591-592. [10] Ibid 592-593.

[11] Cp. Pasquier, Lettres Bk. xix No. 15, "Nos Roys, par une bienveuillance naturelle qu'ils portent à leurs subjects, reduisants leur puissance absolue sous la civilité de la Loy, obéissent leur Ordonnance;" Henry IV. said to the Parlement of Paris, "J'ai remis les uns d'entre vous en leurs maisons d'où la Ligue les avait chassés et les autres en l'autorité qu'ils n'avaient plus. Si l'obéissance était due à mes predecesseurs, il est dû d'autant plus de devotion à moi qui ay restablis l'Estat," cited H. Lureau, Les doctrines democratiques de la seconde moitié du XVIe siècle 18, 19.

[12] Brissaud, op. cit. 881.

except in times of political excitement, the Parlement was no permanent check on the royal will, for its remonstrances could be disregarded, and its refusal to register a law overridden.

Thus neither the representative assemblies of the Middle Ages nor the powers possessed by the central courts of law were able to stand against the new institutions which made for royal absolutism. The constitution and procedure of the representative assemblies were so defective that they were powerless to act efficiently as organs of government in a modern state. They could hamper the activities of the executive government, and they could hinder the development of the state. But they were powerless to criticize intelligently or to control permanently. The lawyers were naturally on the side of the executive government in its efforts to rule efficiently. They were naturally opposed to ineffective assemblies which often voiced the aspirations of a turbulent feudalism, and attacked the abuses of the law. On the other hand, these assemblies had an advantage, the absence of which was fatal to the aspirations of the lawyers to stem the advancing tide of absolutism. They did in a manner represent the nation. The lawyers, as we have seen, in no sense represented the nation. Though the powers which they claimed might have made their courts efficient barriers against arbitrary government, they were the powers of a caste which was often deservedly[1] unpopular. The destruction of their powers roused no national indignation. The enthusiasm for fundamental constitutional laws, administered by the lawyers in their courts, was naturally confined to the lawyers themselves. Nor can we say that the popular instinct was wholly at fault. Fundamental laws generally represent an old order of legal ideas; and thus administered they are apt, in a changing age, to impede the due development of the state.

"*Divide et Impera.*" The new centralized machinery of government, having divided the forces opposed to it, was able to rule supreme. Having suppressed or muzzled the representative assemblies, and having deprived the courts of their political powers, it could exercise supreme authority; and it was able to make that authority felt in every corner of the state, because it was able to supersede the older local officials by delegates responsible only to itself, and subject, not to the ordinary law, but to an administrative law which it itself dispensed.[2] The facts were prepared, and the time was ripe. The first political philo-

[1] H. Lureau, Les doctrines democratiques de la seconde moitié du XVIe siècle 19, "Peu à peu les parlements perdent leur véritable caractère, se mettent en lutte contre la royauté sans s'attirer les faveurs de l'opinion publique, et deviennent insupportables et impopulaires."

[2] Above 110-111.

sopher who could generalize from them could hardly fail to enunciate a theory of sovereignty.

The English Parliaments of the thirteenth and fourteenth centuries were, like the Spanish Cortes and the French Estates General, assemblies in which the king met the various Estates of his Realm.[1] Like their foreign contemporaries, they aspired to control taxation and legislation. The English courts of common law and the English lawyers, like their brethren on the continent, believed that king and subject alike were bound to obey the law; and they claimed and exercised the power to punish all persons or bodies of persons, save the king, who disobeyed it.[2] But the constitutional history of the English Parliament, and the constitutional history of the English courts of common law differ entirely from the analogous continental histories. By the end of the sixteenth century Parliament was recognized as being the "highest and most authentical court of England;"[3] and, under the leadership of Coke, the common lawyers were claiming that the common law administered in their courts was the supreme law, to which even the prerogative of the crown was subject.[4] An examination of the causes for this divergence between the English and the continental development will show us the reasons why, at the close of the sixteenth century, the English state had assumed a form which was unique in Western Europe,[5] and will enable us the better to appreciate the skill with which the Tudor sovereigns maintained an equilibrium amidst the complicated and unstable balance of forces existing in that state.

In the thirteenth century the king's Council was, as we have seen,[6] the "core and essence" of the Parliament; and the term "Parliament" meant rather a colloquy than a defined body of persons. At this Parliament—this colloquy—important cases were decided, and petitions were received.[7] In the course of the fourteenth century this "colloquy" developed into a body possessed of a unique set of powers and privileges. From the king's Council in Parliament there was developed the House of Lords, and from the representative knights and burgesses, who were summoned to meet the king's Council in Parliament, there was

[1] Redlich, Procedure of the House of Commons i 5, 6-9.
[2] Vol. ii 252-256, 435-436, 561-562. [3] Smith, Republic Bk. ii c. 2.
[4] See e.g. Co. Third Instit. 84, "The common law hath so admeasured the prerogatives of the king, that they should neither take away nor prejudice the inheritance of any;" cp. Bacon's Argument in Calvin's Case, Works (ed. Spedding) vii 646, "Towards the king the law doth a double office. . . . The first is to entitle the king or design him. . . . The second is . . . to make the ordinary power of the king more definite or regular. . . . And although the king in his person be *solutus legibus*, yet his acts and grants are limited by law, and we argue them every day."
[5] Below 200-217. [6] Vol. i 352-353; vol. ii 302.
[7] Maitland, Parliament Roll of 1305 (R.S.) xlvii; vol. i 354-355.

developed the House of Commons. Thus from the meeting of the Estates at "a" Parliament or colloquy with the king's Council, there has emerged "the" Parliament; and this Parliament has become an essential organ of the English government. "The High Court of Parliament" has taken a separate and important place among those courts which conduct the government of the mediæval English state.[1]

We have seen that this development had been facilitated by the fact that the Parliament and the lawyers worked together, and that the results of this alliance had been beneficial both to the Parliament and to the law. Parliament had been helped by the technical skill of the lawyers to evolve a workable system of procedure; and the lawyers had not been inclined to dispute the binding force of the statutes which they had helped to make, or to put a narrow construction upon privileges of the House which they, as members, enjoyed. On the other hand, the lawyers had been backed up by Parliament in asserting the supremacy of the law of the state. Thus Parliament and the lawyers had been able, through their alliance, to accomplish much that was impossible in continental states, where the representative assemblies and the lawyers acted on different lines, and sometimes in opposition to one another.[2] The results of this were beginning to be apparent in the fifteenth century. Fortescue's books show that the powers and privileges gained by Parliament had impressed upon the government of the English state a constitutional character which enabled it to be sharply contrasted with the government of France;[3] and that the most striking feature of that constitutional character was the supremacy of the common law.[4]

The use which the Tudor kings made of Parliament during the sixteenth century consolidated the powers and privileges which it had won in the Middle Ages.[5] At the end of this century it stands out as the supreme legislative and taxing authority in the state, possessed of an adequate procedure, and protected by well-recognized privileges. Of the share which Parliament took in legislation and taxation I have already spoken.[6] Here I must say something, firstly, of the development of the rules of procedure, and, secondly, of the importance which questions of privilege were beginning to assume at the end of Elizabeth's reign.

(i) *Procedure.*

We have seen that some of the rules of Parliamentary procedure which we find in Sir Thomas Smith's book de Republica

[1] Redlich, op. cit. i 2; vol. ii 430-434.
[2] Ibid 430-434, 440, 441-443.
[3] Ibid 441.
[4] Ibid 441-442, 561-562.
[5] Above 88.
[6] Above 99-105.

Anglorum, and in D'Ewes' journals of the Elizabethan Parliaments, can probably be traced back to the mediæval Parliaments of the fourteenth and fifteenth centuries.[1] But it is in this century that we get the first clear and authoritative statements of these rules; and it is clear from these statements that in many cases they had then attained almost their final form. Let us look at the forms used at the opening and close of Parliament, at the rules of debate, at the duties of the Speaker, at the forms of legislation, and at the development of the committee system. Upon all these matters Smith speaks; and the accuracy of his account is borne out both by D'Ewes, and by Sir John Eliot's account of the procedure of the earlier Stuart Parliaments which he inserted into his Negotium Posterorum.

Smith's account of the opening of the session, the choice of a Speaker, the Speaker's request for the allowance of the privileges of the Commons, the Lord Chancellor's reply,[2] the speeches at the close of the session, and the ceremonial of the royal assent to or rejection of bills,[3] shows that the procedure upon these matters had practically reached its final form. So near is it to the modern procedure that it is not necessary to describe it in detail.

The rules of debate were strict. "In the disputing," says Smith,[4] "is a mervelous good order used in the lower house. He that standeth uppe bareheadded is understanded that he will speake to the bill. If moe stande uppe, who that first is judged to arise, is first herde, though the one doe prayse the law, the other diswade it, yet there is no altercation. For everie man speaketh as to the speaker, not as one to an other, for that is against the order of the house. It is also taken against the order, to name him whom ye doe confute, but by circumlocution,

[1] Vol. ii 431-433; for an account of the original Commons' Journals and their evolution see J. E. Neale's paper in Royal Hist. Soc. Tr. (1920) 136; it tells us a good deal of the evolution of the House in the sixteenth century.

[2] Bk. ii c. 2 pp. 51-52 (Alston's Ed.). [3] Ibid 57-58.

[4] Ibid 54-55; cp. Eliot's account, Negotium Posterorum (Ed. Grosart) ii 52-53, "for to avoid confusion and disturbance on noe occasion, at noe time is it lawfull for a man in one daie to speake to one business above once, though his opinion altered, though his reason should be chang'd, more than in suffrage wth the generall vote at the last, when the question is resolved by a single yea or noe. Noe personal touches are admitted in anie argument or dispute, noe cavills or exceptions, nor anie member to be nam'd; or when there is contrarietie and dissent may there be mention of the persons but by periphrasis and description. All bitterness is excluded from their dialect, all words of scandall and aspersion; noe man may be interrupted in his speech, but for transgression of that rule, or breach of some other order of the house (as for the intermixing of their business, when one matter is on foote, to stirr another before the decision of the former, wch in noe case is allowable) in all other things, the privilege holds throughout; the business, as the person, has that freedome to pass quicklie to the end; noe disparitie or odds makes a difference in that course; he that does first stand up, has the first libertie to be heard, the meanest burgess, has as much favor as the best knight or counsellor, all sitting in one capacitie of Commoners, and in the like relation to their Countries."

as he that speaketh with the bill, or he that spake against the bill, and gave this and this reason. And so with perpetuall Oration not with altercation he goeth through till he do make an end. He that once hath spoken in a bill though he be confuted straight, that day may not replie, no, though he would chaunge his opinion. So that to one bill in one day one may not in that house speake twise, for else one or two with altercation woulde spende all the time. The next day he may, but then also but once. No reviling or nipping wordes must be used. For then all the house will crie, it is against the order; and if any speake unreverently or seditiouslie against the Prince or the privie counsell, I have seene them not onely interrupted, but it hath beene moved after to the house, and they have sent them to the tower. So that in such a multitude, and in such diversitie of mindes, and opinions, there is the greatest modestie and temperance of speech that can be used."

The Speaker performed very various functions. We have seen that at this period he was the nominee of the Crown, and that he was used by the Crown to control the House.[1] He was the chairman of the House, responsible for the observance by members of the rules of debate, and the person to whom all speeches were addressed.[2] He was the representative and spokesman of the House in its collective capacity.[3] He regulated the order of business, determined what bills should come before the House, explained to the House the bills or other matters which came before them,[4] determined which of two or more members should address the House,[5] and, when the debate was finished, put the question and announced the decision.[6] He was the interpreter of the *lex et consuetudo Parliamenti;* and because he held this judicial position he was not entitled to speak upon bills, nor, except in a case of equality, to vote.[7] During

[1] Above 97-98. [2] Above 175.

[3] "They are willed to choose an able and discreete man to be as it were the mouth of them all, and to speak for and in the name of them," Smith, Bk. ii c. 2, p. 51.

[4] Redlich, Procedure of the House of Commons ii 159; cp. The Speech of Coke as Speaker in 1593, S.P. Dom. (1591-1594) 322, ccxliv 52; D'Ewes 478, 479; Smith, op. cit. Bk. ii c. 2 pp. 53-54; as Redlich says, loc. cit., "He had the power of declaring bills to be out of order or of withholding them from the House as being infringements of the royal prerogative, even at times as being contrary to express commands;" see also a rebuke addressed by Cecil to the Speaker for receiving bills contrary to the Queen's commands, D'Ewes 649.

[5] "If two rise up at once the Speaker does determine it; he that his eye sawe first has the precedence given," Eliot, Negotium Posterorum ii 53.

[6] Below 177.

[7] "The Speaker hath no voice in the house, nor will they not suffer him to speake in any bill to moove or diswade it. But when any bill is read, the speaker's office is as brieflie and as plainely as he may to declare the effect thereof to the house," Smith, Bk. ii c. 2 p. 55; see Redlich, op. cit. ii 167, and the references there cited.

the sixteenth century his duties to the Crown and his duties to the House were compatible. But it is obvious that, if and when the relations of the House and the Crown become less harmonious, his position will not be enviable.[1] It is obvious, too, that if the House succeeds in encroaching upon the powers of the Crown, he will become more and more the representative of the House, and less and less a servant of the Crown.[2]

Smith's account of the forms of legislation shows that, in outline, the normal modern procedure had been reached. He says:[3] "All bils be thrise in three diverse dayes read and disputed upon, before they come to the question. . . . After the bill hath beene twise reade, and then engrossed, and eftsoones reade and disputed on ynough as is thought: the speaker asketh if they wiil goe to the question. And if they agree he holdeth the bill up in his hande and sayeth, as many as will have this bill goe forwarde, which is concerning such a matter, say yea. Then they which allowe the bill crie yea, and as many as will not, say no: as the crie of yea or no is bigger, so the bill is allowed or dashed. If it be a doubte which crie is the bigger, they divide the house, the speaker saying, as many as doe allow the bill goe downe with the bill, and as many as doe not sitte still. . . . It chaunceth sometime that some part of the bil is allowed, some other part hath much contrariety and doubt made of it: and it is thought if it were amended it would goe forwarde. Then they chuse certaine *committees* of them who have spoken with the bil and against it to amende it, and bring it in againe so amended, as they amongst them shall thinke meete: and this is before it is engrossed, yea and sometime after. But the agreement of these *committees* is no prejudice to the house. For at the last question they will either accept it or dash it as it shall seeme good, notwithstanding that whatsoever the *committees* have doone."[4]

[1] Vol. v 423-424; some signs of this were beginning to appear at the end of Elizabeth's reign, above 89-90; below 178-180, 190.

[2] Vol. v 453.

[3] Bk. ii c. 2 pp. 54, and 56-57.

[4] Eliot's account of the forms of legislation and of the functions of these committees, Negotium Posterorum i, 63, is a useful supplement to Smith; he says, "Those [committees] that are for bills on the second reading are designed, the first [reading] being onlie formall, when seldome, or never they are spoken to, but in pointe of rejection and deniall, and that rarelie, if ther be color for the intention, though ther be imperfections in the draught; but at the second reading all objections doe come in, the particulars both of the forme and matter are then argued and debated, and thereupon it passes to Commitment, wher by answear and replie the discussion may be freer in the counter change of reason and opinion, wch is not admittable in the house, when to avoyd contestation and disorder, wch replies and contradictions might induce, and to preserve the gravitie, noe man may speake in one daie, and to one business, above once, though he would change opinion (wch in Comtees is allowable) and therefore upon the second readings of these bills they have such reference and commitment, that ther they may the more punctuallie be considered, and so come to the exacter reformation and amendment."

It would almost seem from Smith's account that, if the House agreed to a bill as drawn, the committee stage might be dispensed with. But such agreement was hardly likely; and it would seem from D'Ewes and Eliot that all bills did as a matter of fact go through this stage. As Eliot explains, the debate in committee was freer, and it was possible to consider the bill and proposed amendments more closely. The select committee to which bills were thus referred was the most usual form of committee. But even in the Middle Ages committees were appointed for other purposes;[1] and in Elizabeth's reign we get many instances of their appointment for many various purposes—e.g. to draw up reasons for declining a conference with the Lords, to discuss with them amendments to bills, to decide election disputes.[2] Towards the end of the century we get a further development. Committees were appointed, not for one specified object, but to deal with constantly recurring topics as and when they arose. For instance we get committees to deal with religion, with election disputes, and with questions of privilege.[3] We shall see that these committees will develop in the following period into certain fixed standing committees.[4]

(ii) *Privilege.*

I have already spoken of the privileges of the House of Commons. We have seen that those privileges which were necessary to the efficiency of the House were maintained and strengthened by the Tudors.[5] In one case—the privilege of deciding disputed elections—a new privilege of great future importance was gained.[6] The chief controversies arose over the privilege of freedom of speech; and the reason why this privilege was a topic of controversy is obvious. It is clear that this privilege might, unless controlled, be so used that it deprived the crown of its initiative in determining the business to be brought before the House, and embarrassed it in the conduct of the government. The strictness of this control was sometimes resented by the House, and the queen sometimes found it politic to give way.[7] But she always refused, whenever possible, to allow members to discuss topics or propose legislation which she

[1] Vol. ii 432.

[2] Redlich, op. cit. ii 205, and references to D'Ewes there cited; as Eliot said, Negotium Posterorum i 64, "In generall all Comtees are for preparation and despatch: the judgment and conclusion is the house's; to facilitate that Court in the multiplicitie of his labors, these are the Argus and Briarius; these Comtees are the sentinells upon all affaires and interests, and these dissolve the difficulties wch their greatness or numbers doe import."

[3] Redlich, op. cit. ii 206-207.

[4] Vol. vi c. 6.

[5] Above 91-92.

[6] Above 95; vol. vi c. 6.

[7] Commons Journals i 76, 77; D'Ewes, 175, 176; above 90.

disliked.[1] In 1587 she had prevented the bill of one Cope from being discussed by the House, and had made the Speaker deliver the bill to her.[2] Thereupon Peter Wentworth drew up the following series of questions which the Speaker put to the House:— "Whether this council be not a place for any member of the same here assembled, freely and without controllment of any person, or danger of laws, by bill or speach, to utter any of the griefs of this commonwealth whatsoever, touching the service of God, the safety of the prince, and this noble realm? Whether that great honour may be done unto God and benefit and service unto the prince and state without free speech in this council, which may be done with it? Whether there be any council which can make, add to or diminish from the laws of the realm, but only this council of parliament? Whether it be not against the orders of this council to make any secret or matter of weight, which is here in hand, known to the prince or any other, concerning the high service of God, prince, or state, without the consent of the house? Whether the Speaker or any other may interrupt any member of this council in his speech used in this House, tending to any of the forenamed high services? Whether the Speaker may rise when he will, any matter being propounded, without consent of the House, or not? Whether the Speaker may overrule the House in any matter or cause then in question; or whether he is to be ruled or overruled in any matter, or not? Whether the prince and state can continue, stand, and be maintained without this council of parliament, not altering the government of the state?"[3] The result of this boldness was that Wentworth and others were committed to the Tower. Nor was this action of the crown on this and other occasions resented by the House.[4]

In fact, as we have seen, during the whole of the Tudor period the crown and the House of Commons worked together. The crown treated the House with respect; and the House approved of the policy of the crown.[5] It was therefore inclined to acquiesce in the crown's claim to the initiative, and not to resent measures taken by the crown against those who wished to disturb this working arrangement. On the other hand, the House was jealous of its privileges. The institution of a committee to safeguard them, by bringing to the notice of the House cases of the breach of their privileges, is a significant sign of the times.[6] The importance of safeguarding the privilege of freedom

[1] Above 89-90.
[2] Hallam, C.H. i 257.
[3] D'Ewes 411.
[4] Hallam, C.H. i 254, 259, 260.
[5] Above 91 n. 6; below 190.
[6] "In each of the parliaments of 1584, 1585, 1586, 1587, and 1588 a committee touching matters of privilege was appointed for the session," Redlich, op. cit. ii 207.

of speech was never lost sight of;[1] and it was clear that if anything happened to disturb the arrangement under which crown and Parliament worked together, its extent would become a matter of the very first importance. The questions raised by Wentworth would then be raised, not by a minority, but by a majority in the House, because their answer in the manner suggested by Wentworth would be essential to an opposition which wished to criticize and control the conduct of the government.[2]

If we look at the powers of parliament over legislation and taxation, which no one disputed; if we look at the development of its procedure, and the extent of its privileges, we can see that it alone of the mediæval representative assemblies had developed into a useful and essential organ in the government of a modern state. No doubt it was strictly controlled by the crown. No doubt the initiative on all important matters was retained by the crown—though retained at the close of Elizabeth's reign with increasing difficulty.[3] But the picture which D'Ewes draws for us of the Elizabethan Parliaments makes it quite clear that it was this control that was largely responsible for making Parliament, and more especially the House of Commons, an efficient organ of government in a modern state. That control did for Parliamentary power and privilege and procedure what it did for the development of local government under the justices of the peace.[4] In both cases the Tudor kings adapted institutions which had begun to develop at the latter part of the mediæval period to the needs of the modern state, by enforcing and increasing their powers, and by diligently supervising the exercise of those powers. Just as the justices of the peace were educated by the various forms of control which the crown and the Council applied to them, so Parliament was educated by the use which the crown made of it, by its constant supervision, by the presence of Privy Councillors in the House of Commons,[5] and by their constant service on its committees.[6] In fact, the increase in the powers and the efficiency of the justices of the peace, and the increase in the efficiency of the House of Commons

[1] "If many of its members were but creatures of power, if the majority was often too readily intimidated, if the bold and honest, but not very judicious, Wentworths were but feebly supported, when their impatience hurried them beyond their colleagues, there was still a considerable party, sometimes carrying the house along with them, who with patient resolution and inflexible aim recurred in every session to the assertion of that one great privilege which their sovereign contested, the right of parliament to enquire into and suggest a remedy for every public mischief or danger," Hallam, C.H. i 264.

[2] Vol. vi c. 6.

[3] Above 90.

[4] Above 163.

[5] Above 98-99.

[6] We often find that all the Privy Councillors in the House put upon committees, e.g. D'Ewes, Journal 157, 345.

helped forward the development of both these instruments of government. (1) The growth of the powers and the efficiency of the justices of the peace directly increased the efficiency of the House of Commons, because many of its members were justices. They were able as members of Parliament to make suggestions for the amendment of the law which their experience as justices had suggested. This acquaintance with practical affairs possessed by many of its members gave a business-like and a practical tone to deliberations in Parliament to which the deliberations of the continental assemblies never attained.[1] These deliberations were therefore a real assistance to the Council in gauging the feelings of the nation,[2] and in the task of devising the measures which were needed both to guard the state against its numerous enemies, domestic and foreign, and to adapt its institutions and its laws to the needs of this new age. (2) Conversely, the growth of the power of the House of Commons increased both the efficiency and the independence of the justices of the peace. As members of Parliament they had helped to make some of the laws which they administered, and they were therefore in a position to understand them and apply them intelligently.[3] As Bacon said,[4] "Those that have voices in Parliament to make laws, they for the most part are those which in the country are appointed and administer the same laws; and for these two institutions, if a man would make a commonwealth by a level, he could not find better than these." The justices of the peace could thus the more easily realize that they were no mere officials of the central government, but independent administrators whose powers had been conferred upon them by the law. For both these reasons they were able to bring to the execution of their various duties those qualities of common sense and individual initiative which are apt to wither under a bureaucratic *régime*.

The result upon Parliament is best described in the well-known words of Sir Thomas Smith:[5] "The most high and

[1] See e.g. D'Ewes, op. cit. 660, 661, 663, 664,—a debate on a bill which involved the increase of the penal jurisdiction of the justices of the peace; ibid 505-507—a debate on bill against aliens; ibid 168-171—a debate on a bill against non-resident burgesses; ibid 86—long arguments on a bill for the increase of the navy; Leonard, English Poor Relief, 130-131, shows that the experience of members of Parliament as justices of the peace was of great assistance in framing the legislation in this subject at the end of Elizabeth's reign; for this legislation see below 396-399.

[2] Thus the Council were well aware from the communications they had received from the justices that the agitation against monopolies expressed the real feelings of the country, see Hamilton, Quarter Sessions from Elizabeth to Anne 23-27.

[3] Thus the Queen addressing the House on its prorogation in 1593 said, "You that be judges and justices of the peace, I command and straitly charge you, that you see the law to be duly executed and that you make them [i.e. the statutes just passed] living laws when we have put life into them," D'Ewes, Journal 467.

[4] Speech in the Star Chamber 1617, Spedding, Letters and Life vi 304.

[5] De Republica Anglorum Bk ii c. 1.

absolute power of the realme of Englande, consisteth in the Parliament. For as in Warre where the king himselfe in person, the nobilitie, the rest of the gentilitie, and the yeomanrie are, is the force and power of Englande: so in peace and consultation where the Prince is to give life, and the last and highest commaundement, the Baronie for the nobilitie and higher, the knightes, esquiers, gentlemen and commons for the lower part of the commonwealth, the bishoppes for the clergie bee present to advertise, consult and shew what is good and necessarie for the commonwealth, and to consult together, and upon mature deliberation everie bill or lawe being thrise reade and disputed uppon in either house, the other two partes first each a part, and after the Prince himselfe in presence of both the parties doeth consent unto and alloweth. That is the Princes and whole realmes deede: whereupon justlie no man can complaine, but must accommodate himself to finde it good and obey it . . . That which is doone by this consent is called firme, stable, and sanctum, and is taken for lawe. The Parliament abrogateth olde lawes, maketh newe, giveth orders for thinges past, and for thinges hereafter to be followed, changeth rightes, and possessions of private men, legittimateth bastards, establisheth formes of religion, altereth weightes and measures, giveth forms of succession to the crowne, defineth of doubtfull rightes, whereof is no lawe alreadie made, appointeth subsidies, tails, taxes and impositions, giveth most free pardons and absolutions, restoreth in bloud and name as the highest court, condemneth or absolveth them whom the Prince will put to that triall: And to be short, all that ever the people of Rome might do either in *Centuriatis comitijs* or *tributis*, the same may be doone by the parliament of Englande, which representeth and hath the power of the whole realme both the head and the bodie. For everie Englishman is entended to bee there present, either in person or by procuration and attornies, of what preheminence, state dignitie, or qualitie soever he be, from the Prince (be he King or Queene) to the lowest person of Englande. And the consent of the Parliament is taken to be everie mans consent."

Smith and all other writers[1] of this century speak of Parliament as a court—"the highest and most authentical court of England"—but still a court. This is a significant, but a very intelligible fact. A large part of the government of the country, central and local, was carried on by courts acting under judicial forms. That all governing bodies partook of the nature of courts was therefore an idea which came naturally to those who treated of public law. Moreover, most of the books which

[1] E.g. Lambard, Crompton and Coke.

treated of the Parliament were written by men who had been trained in the common law;[1] and all of them were familiar with the ideas of the common law. Thus it is not surprising that all writers (whether common lawyers or not) should talk of Parliament as a court. The lawyers found it so treated of in the Year Books: and all could see that its judicial functions and attributes were, and indeed still are, well marked.[2] In fact, for some time after the term "court" had come to signify simply a judicial tribunal, lawyers occasionally spoke of an Act of Parliament as a "judgment of the Parliament;"[3] and for a yet longer time lawyers and statesmen and ecclesiastics will speak of "the High Court of Parliament." They will thus continue to speak of Parliament as a court, partly because ideas derived from the period when it was one among many mediæval courts have had a permanent influence upon its powers, its privileges, and its procedure; partly because, in the sixteenth century, the lawyers were a very important class among its members;[4] and partly because in the seventeenth century—the century in which the powers and privileges and procedure of Parliament gained their permanent shape—the lawyers, to whom the conception of a court came naturally, were the leaders and champions of the Parliamentary cause.

But I think that too much stress should not be laid upon the fact that Parliament thus continued to be spoken of as a court. We have seen[5] that even in Henry VI.'s reign the lawyers were beginning to discover that conceptions borrowed from the law as

[1] The chief exception is Smith, who was a Roman lawyer, and a statesman rather than a common lawyer; but his book on the Republic of England was meant to be a popular sketch, and he naturally adopts the received terminology, below 184; for a criticism of some of the deductions Mr. Alston draws from this terminology see below 211 n. 5.

[2] For the various kinds of jurisdiction exercised by the House of Lords see vol. i 365-394. It should be noted that till quite the end of Elizabeth's reign the judges served on some committees of the House of Lords, not as attendants upon the committee, but as members of it, D'Ewes Journal 22, 67, 99, 101, 108, 142; in 1585 they were named as attendants only ibid 319, and on another occasion as members ibid 322; in 1589 they were also named as members ibid 422, but after 1597 as attendants only ibid 527; when dealing with private bills (the procedure upon which is still quasi-judicial) the House of Commons was often styled a Court, e.g. ibid 587; and also when dealing with certain cases of privilege, ibid 514, 515.

[3] Thus in Chudleigh's Case (1589-1595) 1 Co. Rep. at p. 132b, Walmesley, J. and Periam, C. B. said that the Statute of Uses was a, "judgment given by the whole Parliament;" cp. Brooke, Ab. *Parlement* pl. 73 (39 Hy. VIII.); Bacon's argument in Calvin's Case, Works (ed. Spedding) vii 671, speaks of two statutes as "judgments in Parliament by way of declaration of law," Hale, P.C. i 270, speaks of the Act attainting Strafford as "a particular judgment."

[4] In 1545 Wriothesley, writing to Paget and Petre as to a proposal to hold the Parliament at Reading, said that, if it were held there, it would be best to adjourn the law term, as, without the judges, sergeants, and other persons engaged at the Courts, "you shall have a very simple assembly." Letters and Papers xx Pt. ii No. 302; cp. L. and P. vi no. 1381, above 97 n. 5; below 188-189.

[5] Vol. ii 434 and n. 4.

to the jurisdiction of courts could not easily be applied to those powers of taxation and legislation which were fast coming to be the most important functions of a Parliament. As in the case of local government in this century, so in the case of Parliament, non-judicial functions were being rapidly developed. At the end of the century the growth of these functions had made it obvious that Parliament was comparable quite as much to the Council as to a court.[1] "This court," said Coke, when addressing the House of Commons as Speaker in 1592-1593, "is not a court alone."[2] It had indeed become very different from any other court, for in it were represented the king and the three estates of the realm—"The great corporation or body politic of the kingdom."[3] It was this fact which gave to it its "high, absolute, and authentical powers;" and it was these powers which were destined so to expand in the following century that the sovereignty of Parliament has become the central and characteristic feature of English constitutional law. As with the justices of the peace in the sphere of local government, so with Parliament in the sphere of central government, a mediæval institution had been so adapted that it was able to satisfy the requirements of the modern state, and develop with its development.

That Parliament, without ceasing to possess some of the characteristics of a court, could be so used by the Tudor sovereigns that it became a true legislative assembly,[4] is due largely to the manner in which the lawyers had guided its development in the fourteenth and fifteenth centuries, and especially to the substitution of the practice of legislating by bill for the practice of legislating by petition.[5] So long as legislation took the form of a petition to the king, those petitions which resulted in legislation

[1] It was so spoken of by Peter Wentworth, D'Ewes, Journal 411, above 179; and by Bacon, who said in his letter of advice to Villiers in 1616 that the Houses of Parliament "are more properly a Council to the king, the great Council of the kingdom, to advise his Majesty of those things of weight and difficulty which concern both the king and the kingdom, than a court," Spedding, Letters and Life vi 38.

[2] D'Ewes, Journal 515, "Though any court of record hath this jurisdiction to make out processes, yet this court cannot. Why? This may seem strange that every court in Westminster, every court that hath causes of Plea, every lord's leet, and every court baron hath his powers that they may make out process; yet this court being the highest of all courts cannot; how can this be? The nature of this House must be considered; for this court is not a court alone; and yet there are some things wherein this court is a court by itself, and other things wherein it is no court of itself;" cp. ibid 434, where the Speaker describes it as 'The highest court of all other courts and the great council also of this realm."

[3] Coke, Fourth Instit. 2; this statement of Coke's is founded on earlier authorities—it is said in Y.B. 14 Hy. VIII. Mich. pl. 2 p. 3, "Auxy est Corporacion per le Common Ley come le Parliament du Roy et Seigneurs et les Commons sont un Corporacion;" cp. Willion v. Berkeley (1561) Plowden 234 "And he and all his subjects together form the Corporation, as Southcote said, and he is the head and they are the members, and he has the sole government of them."

[4] Above 90-92, 174. [5] Vol. ii 439-440.

did not differ materially from petitions which resulted in a judicial decree;[1] and a petition to Parliament for a private Act still retains the judicial characteristics which marked the early stages in the history of every variety of Parliamentary legislation. But there could be no talk of petition in connection with the many important bills which during this period originated with the crown; and, as they required the consent of both Houses, their passage emphasized the fact that Parliament was a partner in the work of legislation. Bills whether originating from the crown or not, to which the king and the two Houses had assented, resulted in an Act of the Parliament; and it gradually became clear that even the bills of private persons, which asked for something in the nature of a judicial decree, fell, if enacted by the same authority, into the same category.[2] But since their judicial character was more strongly marked, it was with more difficulty that their position as legislative acts was realized. The methods adopted to sift the sufficiency of the reasons alleged by these petitioners for private Acts were judicial in their nature.[3] The passage of the ordinary private bill partook somewhat of the character of a civil action; and the passage of an Act of attainder partook somewhat of the character of the criminal trial. Until Henry VIII.'s reign it was not clear that the law would admit the validity of an Act of attainder passed without hearing the accused in his defence. But in Henry VIII.'s reign it was realized that Acts of the Parliament, whether public or private, were legislative in character; and the judges were obliged to admit that these Acts, however morally unjust, must be obeyed.[4] The legislation which

[1] Vol. ii 437-438.

[2] Y.B. 4 Hy. VII. Mich. pl. 11, "En le Parlement le Roy voulait que un tiel soit attaint, et perdrait ses terres, et les Seigneurs assentirent, et rien fuit plede des Commons purquoi touts les Justices tenirent clerement, que ce ne fuit Acte, perquoi il fuit restore."

[3] Thus it was the practice to hear counsel at the Bar of the House on such bills, see D'Ewes, Journal 50, 68, 86, 317; at p. 124 (1566) there is the following entry: "This morning the Dean of Westminster was present at the Bar with his counsel; viz., Mr. Edmund Plowden of the Middle Temple, and Mr. Ford a civilian. The Dean himself made an oration in defence of the Sanctuary, and alleged divers grants by King Lucius and other Christian Kings, and Mr. Plowden alleged the grant of Sanctuary there by King Edward five hundred years ago; viz., *Dat.* in *an* 1066 with great reason in law and chronicle; and Mr. Ford alleged divers stories and laws for the same; and thereupon the bill was committed to the Master of the Rolls, and others [not named] to peruse the grants, and to certify the force of the law now for Sanctuaries."

[4] Co. Fourth Instit. 37, 38, "I had it of Sir Thomas Gawdye knight, a grave and reverend judge of the King's Bench, who lived at that time, that King H. VIII. commanded him to attend the chief Justices and to know whether a man that was forthcoming might be attainted of High Treason by Parliament, and never called to his answer. The Judges answered that it was a dangerous question, and that the High Court of Parliament ought to give examples to inferior Courts for proceeding according to Justice. But being by the express commandment of the King, and pressed by the said Earl [Cromwell] to give a direct answer: they said that if he be

had deposed the Pope and made the church an integral part of the state had made it clear that the morality of the provisions of a law, or the reasons which induced the legislature to pass it, could not be regarded by the courts. "*Nil ineptius lege cum prologo*," said Bacon in his argument in Chudleigh's Case, "*jubeat non disputet* . . . for the law carries authority in itself." [1]

But when an Act of Parliament had acquired this authority, the last remnants of the idea that there might be fundamental laws, which could not be changed by any person or body of persons in the state, necessarily disappeared. It was obviously difficult to assign any limits to the power of the Acts of a body which had effected changes so sweeping as those effected by the Reformation Parliament.[2] I do not forget that Coke sometimes writes as if he believed in the supremacy of a law which even Parliament could not change.[3] But it would, I think, be a mistake to lay too much stress on isolated statements of this kind.[4] In the first place, Coke was often inconsistent because he had the mind of an advocate, and therefore often allowed himself to be carried away by the argument which he was urging at the moment.[5] In the second place, he was so thoroughly steeped in mediæval

attainted by Parliament, it could not come in question afterwards, whether he was called or not to answer . . . *Facta tenent multa, quæ fieri prohibentur;* the Act of Attainder being passed by Parliament—did bind as they resolved."

[1] Argument in Chudleigh's Case, Works (ed. Spedding) vii at p. 625, where he is talking of the preamble to the Statute of Uses; the passage runs as follows: "And whereas a wise man has said, *nil ineptius lege cum prologo, jubeat non disputet;* this had been true if preambles are annexed for exposition; and this gives aim to the body of the statute; for the preamble sets up the mark, and the body of the law levels at it."

[2] See the preamble to 25 Henry VIII. c. 21; and cp. a saying of Burghley reported by James I. Works 533, to the effect that, "he knew not what an Act of Parliament could not do in England;" Bacon also pointed out that an Act of Parliament cannot bind a future Parliament, "for a supreme and absolute power cannot conclude itself," Works vi 160, cited Tanner, Constitutional Documents 6 n. 2.

[3] See especially Bonham's Case (1609) 8 Co. Rep. 107, 118—"In many cases the law will control acts of Parliament and sometimes adjudge them to be utterly void;" cp. Maitland, Constitutional History 300, 301; similarly in Calvin's Case (1609) 7 Co. Rep. at pp. 13a and 25a there is some loose talk of the impossibility of altering even by Parliament a provision of natural law; see vol. ii 441-443

[4] I think that Mr. McIlwain, The High Court of Parliament 286 seqq., exaggerates their importance; Bacon clearly did not hold this view, above nn. 1 and 2, and 181; in other passages in his argument in Chudleigh's Case the same view is repeated—thus at p. 623 he says that the judges' authority over laws is "to expound them faithfully and apply them properly;" at p. 633, to the argument that the limitations in that case should be allowed because they would be a refuge in time of trouble to great houses, he says, "If force prevail above lawful regiment, how easy will it be to procure an Act of Parliament to pass according to the humour and bent of the state to sweep away all their perpetuities;" it is true that in the Discourse on the Commission of Bridewell, Works vii 509-516, he talks (at p. 513) as if he thought that an Act of Parliament which contravened Magna Carta would be void; but such a view is wholly opposed to the latter part of the Discourse, where he expressly allows that departures from the clause of Magna Carta which he is considering are valid because they are made by Parliament.

[5] Vol. v 474-476.

law that he sometimes reproduces ideas which he himself would have admitted to be archaic.[1] In the third place, he is often writing and thinking of the supremacy of the existing law, and not of the question whether Parliament was competent to change it. When Parliament is not sitting it is the existing law, as interpreted by the judges, which is supreme; and when, as in the seventeenth century, the different component parts of the Parliament cannot act together, the same result ensues. In the Fourth Institute, when he is dealing specifically with the powers of Parliament, and in other passages, he admits its supremacy freely and fully.[2]

In the sixteenth century, therefore (whatever may be true of earlier periods), it is clear that the supremacy of the law, taught by Bracton and the Year Books, has come to mean, not the supremacy of an unchangeable law, but the supremacy of a law which Parliament can change.[3] The supremacy of the law is coming to mean the supremacy of Parliament. That the lawyers never placed any difficulty in the way of this evolution was a fact which had large effects upon the future development both of the constitution and of the common law.

Because they did not insist upon the existence of fundamental laws which could not be changed by the ordinary legislative machinery of the state, they were not thrust into a position of political conflict with the crown. The supremacy of the existing law, so long as Parliament saw fit to leave it unaltered, was guaranteed by the powers of Parliament;[4] and to Parliament

[1] E.g. he says, Fourth Instit. 14, that the commons may say that they cannot answer without conference with their constituents; see above 168 n. 5 for the archaic character of this idea.

[2] Fourth Instit. 36, the power of Parliament is "so transcendent and absolute that it cannot be confined either for causes or persons within any bounds;" ibid 37, talking of an act of attainder, he clearly distinguishes the expediency of a law from the power to make it; ibid 42, 43, "Acts against the power of subsequent Parliaments bind not;" cp. Second Instit. 498, where a record of Edward I.'s reign is cited to the effect that "the award of Parliament was the highest law that could be;" Co. Litt. 115b, "the common law hath no controller in any part of it but the high court of Parliament, and if it be not abrogated or altered by Parliament it remains still;" Bl. Comm. i 160, 161; Dicey, Law of the Constitution 46. I use the word "Supremacy" advisedly, as I do not think that Coke had fully grasped the doctrine of sovereignty as taught by Bodin, and after his day, by Hobbes—as to this see below 208-209.

[3] D'Ewes, Journal 164, "Mr. Morrison said, it were horrible to say, that the Parliament hath not authority to determine of the crown; for then would ensue, not only the annihilation of the statute, 35 H. 8, but that the Statute made in the first year of her Majesty's reign of recognition, should also be laid void;" cp. Yelverton's Speech, ibid 175, 176.

[4] That Parliament identified itself with the cause of the supremacy of the law is clear from D'Ewes—see e.g. op. cit. 168—a high prerogative speech by Sir Humphrey Gilbert "was disliked, as implying many occasions of mischief;" ibid 176—Yelverton said, "The Prince could not of herself make laws, neither might she of the same reason break laws;" ibid 238—Peter Wentworth's speech citing Bracton as to the subjection of the King to the law; ibid 411—Peter Wentworth asked "whether there be any Council which can make, add to, or diminish from the law of the Realm, but only this Council of Parliament."

they could safely leave the political task of maintaining this position. There was no need therefore for the courts of common law to be anything but useful servants of the crown; and, for this reason, there was not the same temptation that there was abroad to supersede them by the newer courts which depended more directly upon the king's will. Though many new courts arose in this country, the king was content, as we shall see,[1] to allow the ordinary courts to continue to exercise their old jurisdiction. They thus continued to be the guardians and the interpreters of the common law; and since the rules of the common law contained the greater part of the public law of the state, the courts retained many of those political functions of which in foreign countries they were deprived by the growth of a system of administrative law.[2]

These political functions exercised by the courts harmonized with the character which the local government of the country had assumed.[3] The officials and communities to which the local government was entrusted originated, as we have seen, at a period when the mediæval view that the law was supreme was unquestioned. Their powers and duties were determined for the most part by statutes, and by old rules of the common law. They could be punished by the common law courts for misfeasances and for non-feasances; and by means of the prerogative writs they could be ordered to act or to refrain from acting, or their decisions could be questioned. It is clear that authorities of this kind, thus controlled, will not easily become the mere officials of the central authority, nor easily subjected to a system of administrative law.

Thus in England and in England alone the mediæval conception of the supremacy of the law was adapted to the needs of a modern state. That it could be thus adapted was due in part to the retention by the Tudors of the mediæval machinery of local government, but chiefly to the maintenance of the old alliance

[1] Below 274-275.

[2] See Bacon's discourse on the Commission of Bridewell, Works (ed. Spedding) vii 509-516—many of the old Y.BB. cases are cited to show that the law is supreme, and that the Judges can hold to be void grants contrary to law; and at p. 514, he cites a case of Elizabeth's reign in which this view was acted upon—"There was a commission granted forth in the beginning of the reign of her Majesty that now is for the examination of felons and other lewd prisoners. It so fell out that many men of good calling were impeached by the accusations of felons. Some great men and judges also entered into the validity of the Commission. It was thought that the Commission was against the law, and therefore did the Commissioners give over the Commission, as all men know;" cp. L. and P. v no. 1430 (1532), Audley reports that, as no lieutenant had been appointed for the king's absence, the judges were much exercised as to "how the king's laws and justice should proceed;" they discussed the matter in the Exchequer Chamber, and it was determined to keep quiet about it, "as any doubt of error can soon be remedied by Parliament;" ibid vii no. 1042—a consultation with the judges as to the authority of proclamations.

[3] Above 164-165.

between Parliament and the common law. Foreign writers, like Hotman or Duplessis-Mornay, who protested against the growth of royal absolutism, argued from the powers which the representative assemblies and courts of law had possessed in the Middle Ages; or they adapted to modern needs the mediæval theories designed to uphold the supremacy of law.[1] But on the continent the powers of those assemblies and the theories of the lawyers had never coalesced. It was only in England that the powers of Parliament had come to be regarded as the main security for the supremacy of the law; for it was only in England that the lawyers, by freely admitting the legislative supremacy of Parliament, had gained the support of Parliament and the nation for the mediæval doctrine of the supremacy of the law. It was the continuance of this alliance between Parliament and the lawyers, which in the following century[2] finally secured the triumph of a conception which was destined, in yet later centuries, to have a vast influence upon the political ideas and machinery of the old and new world.

But the question at once arises, How could this conception of the supremacy of the law, which Parliament and the common law courts were working out between them, square with the position which the crown and Council were assuming in the state? We have seen that the Council by no means confined itself to the work of administration. On the contrary, it exercised a diligent supervision and control over the local government,[3] over the courts,[4] and over Parliament;[5] and it sometimes itself assumed to exercise the functions of these bodies. It and its offshoots exercised a constantly increasing jurisdiction which encroached upon the spheres both of the justices of the peace and of the common law courts; it exercised certain powers over finance, and it legislated by proclamation. In fact Parliament and the common law courts on the one side, and the Council and its offshoots on the other, had begun to develop rival theories of the state. The theory of the Parliament and the common law, which was based upon the supremacy of Parliament and the common law, was at many points directly contradictory to the theory of the Council, which, being based upon the powers of the prerogative, was somewhat similar to the theories which were growing up on the continent.[6] Nor was the influence of these two rival theories of the state confined to the organs of the central government. We have seen that it extended also to the local government. While on the one hand the Council sometimes regarded the justices of the peace and the other officials of the local government as its agents and deputies,

[1] Below 197-199.
[2] Vol. vi c. 6.
[3] Above 71-80.
[4] Above 83-87.
[5] Above 88-105.
[6] Above 109-110, 172-173; below 191-192.

subject to its jurisdiction and protected by its authority, on the other hand, the common law courts regarded them as deriving their authority from the common law and the statutes, and entitled to act freely and independently so long as they properly performed their legal duties.[1]

During the earlier part of this century these two theories of the state had hardly emerged; and, during the greater part of the century, war against domestic disorder and foreign enemies, the adaptation of mediæval institutions and mediæval law to modern needs, and the settlement of the English Church, absorbed all the energies of the State.[2] But, when this work had been accomplished, the fundamental differences between the two theories inevitably appeared.[3] At the end of Elizabeth's reign the constitutional problem was beginning to emerge. Elizabeth employed all her popularity and all her consummate tact to prevent its discussion; and out of respect for her the nation was content to shelve an inquiry into the many fundamental questions of public law which such a discussion would have raised. It is for this reason that English lawyers can state no such certain law as to the position of the king as their foreign contemporaries; and that English political philosophers have as yet been unable to grasp Bodin's theory of sovereignty. But this we shall see more clearly when we have examined the position assigned to the king, and the prevailing theories of the state abroad and at home.

The New Position of the King and the New Theory of the State

The books of mediæval lawyers like Beaumanoir and Bracton show us that the legal renaissance of the thirteenth century had already tended to give the king a position higher than that of a mere feudal lord;[4] and this tendency had been continued and emphasized by the lawyers of the fourteenth century. In France the lawyers laid it down that the kingdom was not inheritable

[1] Above 165.

[2] Thus in Henry VIII.'s reign we see the justices of assize and the Star Chamber working together, Bakers, Brewers and others of Andover v. Knyght (1534), Select Cases in the Star Chamber (S.S.) ii 208, 209.

[3] This was clearly seen by Sir Walter Raleigh; in his tract called "The Prerogative of Parliaments in England proved in a Dialogue between a Councillor of State and a Justice of the Peace" (Ed. 1640) 60, 61, the justice is represented as saying, "If the House press the King to grant unto them all that is theirs by the law, they cannot in justice refuse the King all that is his by the law. And where will be the issue of such a contention? I dare not divine, but sure I am that it will tend to the prejudice of both King and subject."

[4] Vol. i 87; ii 253; iii 463-469; for Beaumanoir see Esmein, Histoire du droit Francais 385, 537-538.

like an ordinary fief,[1] and that it was impartible;[2] that the royal domain was inalienable, because it belonged rather to the crown or state or nation than to the human king;[3] that no distinction could be drawn between the king's private property and the domain of the crown;[4] that the king, as king, had over all his subjects rights to impose taxation, to require military service in times of national peril, and to exercise jurisdictions which differed from, and were superior to, the rights of an ordinary feudal lord;[5] that the powers of the feudal lord were but concessions from the king which must be strictly construed.[6] Moreover, there was a tendency, as the theory of the Holy Roman Empire became more and more obviously unreal,[7] to put the king, *qua* his own dominions, into the place formerly occupied by the emperor. Bartolus, Baldus, and other lawyers taught that a state which recognized no superior was an imperium.[8] "Civitas sibi princeps," "Rex in regno suo est Imperator regni sui," "Dominus princeps terræ suæ," were various phrases in which this truth was expressed.[9] Similarly in the fourteenth century, the kings both of England[10] and of France[11] claimed expressly to be emperors in their realms; and in France the deduction that the king was not bound by the ordinary laws was admitted in the thirteenth century.[12] In the sixteenth century other kings made the same claims;[13] and the lawyers were careful to explain that Roman law was received, not because the kingdom was subject to the empire, but because of its own inherent reasonableness.[14]

These theories tended to remain merely theories amidst the

[1] Esmein, op. cit. 360-368; Brissaud, Histoire du droit Francais 782, 783.

[2] Ibid 782; Esmein, op. cit. 368-371—however, as Esmein points out, the principle was to some extent infringed by the appanages given to younger children, which, as in England in the later Middle Ages, tended to raise up a new nobility (vol. ii 410); but by the sixteenth century measures had been taken to remedy this defect.

[3] Esmein, op. cit. 371-375.

[4] Ibid 375-378.

[5] Ibid 385-388.

[6] Ibid 388.

[7] For this theory see vol. ii 121-122, 127-128.

[8] Gierke, Political Theories of the Middle Age (Maitland's Tr.) 97; Royal Hist. Soc. Tr. (N.S.) xix 159.

[9] Woolf, Bartolus of Sasso-Ferrato 380—the first is a phrase of Bartolus, the second of Baldus, and the third of Cino.

[10] Gierke, op. cit. xlv n. 14; cp. the preamble of Henry VIII.'s statute of Appeals (1535), "This realm of England is an empire," vol. i 589.

[11] Esmein, op. cit. 384 n. 2, citing Boutillier, Somme Rurale II, tit. I. p. 646; Brissaud, op. cit. 771 n. 1; Boutillier died in 1395.

[12] Esmein, Essays in Legal History (1913) 205.

[13] Duck, De usu et auctoritate juris civilis Bk. ii c. 1.

[14] Ibid xiii, "Singuli (principes) profitentur se in suis dominiis superiorem non agnoscere, iidemque legibus Romanis se obtemperare profitentur, non ex vi legum, sed imperio rationis, quæ legibus omnibus humanis est superior; et dum Cæsarum mandata et jussa respuunt, eorum legibus libere sponteque se submittunt, cum inter omnes leges humanas non possit par norma inveniri, ad quam leges suas patrias accomodare possint;" below 252.

turbulence of the fourteenth and fifteenth centuries.[1] But, with the revival of royal power in the sixteenth century, with the creation of new machinery by means of which that power could make itself felt in all parts of the kingdom, and with the new meaning which the revival of classical studies gave to the texts both of classical writers on the state and of Justinian's books—they began to assume a very practical importance.[2] Their consequences were developed, and they were given a sharper edge; for, under the influence of classical ideas, they were put forth unencumbered by the mediæval view that kingship involved duties as well as rights. And, under the influence of the changed ideas as to the relationship of church and state, which came with the Reformation, the king as the representative of the state began to hedge himself with that divinity which in mediæval times had been more especially the attribute of the church.[3]

These new theories did not prevail without a struggle with the older theories. We have seen that, throughout the greater part of the sixteenth century, both in France and in the Spanish Empire, the older courts[4] and the older assemblies[5] struggled against the growth of royal absolutism.[6] But, by the end of the century, the king had made good his position in both these countries. The mediæval institutions, which were based upon the theory that a ruler was under duties to his subjects to maintain justice and to further the commonweal; which implied, therefore, the legality of resistance to a tyrant who neglected these duties, were fast disappearing.[7] When the old restraints had vanished Titius was left without rights against an omnipotent State,[8] represented by an absolute king, accountable only to God, and subject to no duties enforceable by merely human law. The king was himself the state.[9]

[1] As Gierke says, op. cit. 96, "We may see in theory the new edifice of the Modern State being roofed and tiled when, in the world of fact, just the first courses of this new edifice are beginning to rise amidst the ruins of the old."

[2] Ibid 4-7; Brissaud, op. cit. 773.

[3] Above 18-19; J. N. Figgis, Camb. Mod. Hist. iii 751, 752; Bodin, République Bk. i c. 8 speaks of the "Monarque souverain qui ne doit serment qu'a Dieu seul, duquel il tient le sceptre et le puisance;" and, c. x, he says that kings are established by God as his lieutenants, and that there are no persons greater on earth after Him.

[4] Above 169-172. [5] Above 166-168.

[6] Thus France was not regarded as a type of absolute monarchy when Machiavelli wrote. Il Principe, c. iv, where, from this point of view, he contrasts it with the Ottoman Empire.

[7] Gierke, op. cit. 34.

[8] Ibid xxviii, Maitland says, "Titius and the State, these the Roman lawyers understood, and out of them and a little fiction, the legal universe could be constructed;" cp. Figgis, From Gerson to Grotius 78.

[9] Gierke, op. cit. 98; Esmein, op. cit. 391-392; above n. 3; Lavisse et Rambaud, Histoire Générale iv 139, speaking of France say, "Les études du droit romain, renouvelées au temps de la Renaissance, font oublier l'ancien droit du moyen âge. . . . Ce que reste de grands dans le royaume n'ayant plus qu'un prestige de repré-

This new omnipotent state needed a new political theory to explain it. That theory was found in Bodin's doctrine of sovereignty, and its application to the position of the king. This doctrine and its application were received, because they gave an explanation of existing political facts, which was both true in substance and scientific in form. At the same time the mediæval view of the position of the king was never completely lost sight of. Mediæval theories were adapted to the new environment of the territorial state; and, in their new dress, they have influenced modern political thought as profoundly as Bodin's doctrine of sovereignty. But, in this century, political facts were making for the predominance of the new theory of the sovereignty of the king over adaptations of the older theories. If we look at this new theory, and at one or two of the rival theories which emerged in this century, we shall be able to appreciate the character which, in spite of opposition, the continental state was assuming during this period.

Bodin's six books on the Republic contain a great deal more than a new theory of the state. They deal among other things, with the form and purpose of the state, with its internal organization and its external relations, with the officials, corps, colleges, estates, and communities comprised in it, with the causes of its birth, increase, and decay, and with finance. Moreover, throughout the six books many practical hints are given as to the conduct of government.[1] These books contain not only the author's own views upon the many problems of public law, but also an account of the manner in which these problems had been dealt with in the ancient world, in the Middle Ages, and in Europe of the sixteenth century.[2] Thus it connects the voluminous discussions of the mediæval jurists upon many political problems, with the treatment of those problems by the sixteenth century jurists, who wrote under the influence of those new methods of applying the information derived from the classical authors of the ancient world, which had come with the Renaissance.[3] Seeing that the author was a

sentation honorifique, les Etats généraux ne se convoquant qu'à de rares occasions, l'Eglise étant liée au roi, soit du gré soit en depit du pape, il n'existe qu'un pouvoir en France—le pouvoir monarchique. Le roi ne compte plus de vassaux; il n'a que des sujets. Ce n'est plus un suzerain; c'est un souverain, un souverain absolu, qui peut tout, qui prévoit tout, qui attire tout a lui, petits et grands, du bas en haut de l'échelle sociale. Il n'y a plus de castes; il n'y a que le degrés d'une vaste pyramide au sommet de laquelle trône le roi, maitre des corps et des âmes."

[1] His book, says Janet. Histoire de la science politique, ii 114, "ne peut être comparée, pour l'etendue du sujet et la richesse des materiaux, qu'a la politique d'Aristote ou à l'Esprit des lois."

[2] "Bodin consulte touts les histoires et son livre n'a d'égal que celui de Montesquieu pour le nombre des faits," Janet, op. cit. ii 114.

[3] "Plus juris-consulte que publiciste il a toutefois l'honneur d'avoir donner exemple à Montesquieu de cette union de la politique et droit," Janet, op. cit. ii 114, 115. Similarly in this country it is one of Maitland's many titles to fame that he by his example showed the necessity of uniting these two allied branches of knowledge.

Frenchman, instances drawn from French history are most frequent and are cited with more accuracy than instances drawn from the history of other countries.[1] Seeing that he was a monarchist, he believes that monarchy is the best form of government.[2] Seeing that he was a politique, he was no bigot; and he was in advance of his age in his advocacy of tolerance towards divergent sects.[3] But the book was not merely a treatise written with a view to a particular controversy in a particular state. It takes a broad and comprehensive view of the problems which it discusses. Really it is a work quite as much upon comparative constitutional law and public administration as upon political science; and for that reason alone its success shows that it was of immense value to all statesmen and publicists of the period, irrespective of creed or nationality.[4]

Though these qualities secured it popularity in the age in which it was written, they would not have made it a classical book, or entitled its author to be called the "The greatest political theorist of the sixteenth century, after Machiavelli."[5] Its fame as a classical book rests upon the fact that it contains this new theory of the sovereignty of the state. According to this new theory the sovereignty of its ruler is the essence of the state.[6] The existence or non-existence of a sovereign ruler supplies the test which distinguishes the state from other associations;[7] and according to whether the sovereign ruler is one or few or many, states can be classified.[8] But though sovereignty could be vested in one or few or many, the attributes of sovereignty could be most clearly grasped when it was vested in a single person;[9] and Bodin, as we have seen, regards this as the most perfect form of government.[10] In fact he, in common with many other statesmen of the sixteenth century, could hardly fail to prefer such a form of government, because it seemed the one form of government which was able to keep the peace and guide the state through the perils of this age of change.[11]

[1] Thus he regards the English king as an absolute ruler, Bk. i c. viii pp. 102-103.
[2] Bk. vi c. iv p. 737. [3] Bk. iv c. vi p 478.
[4] It was first published in 1577; there were three editions between 1577 and 1580; and in 1586 the author published an enlarged Latin translation. "It was translated into English (in 1606) and made a textbook at Cambridge," Figgis, Divine Right of Kings, 128; Alston's Ed. of Smith's Republic xlii.
[5] Janet, op. cit. ii 114.
[6] Bodin in his first sentence defines the Republic as, "Un droit gouvernment de plusieurs mesnages, et de ce qui leur est commun, avec puissance souveraine."
[7] Bk. i c. ii p. 9. "La Republique sans puissance souveraine qui unist tous les membres et parties d'icelles, et tous les mesnages, et colleges en un corps, n'est plus Republique;" cp. Bk. iii c. vii p. 347.
[8] Bk. vi c. iv p. 713.
[9] "Only under the form of monarchy does the notion of sovereignty readily lend itself to popular exposition," Figgis, Divine Right of Kings 91.
[10] Above n. 2.
[11] Cp. Figgis, Camb. Mod. Hist. iii 748, "He (Bodin) typified and helped to create that alliance between the Kings and the theorists of sovereignty which formed part of the strength of monarchy."

Bodin's account of sovereignty is sometimes a little confused owing to the mass of detail in which it is involved. But the gist of the matter is there; and little was left to be added even by such a successor as Hobbes. It is clearly pointed out that sovereignty must be absolute,[1] and that it could be fettered by no merely human laws,[2] by no coronation oaths, and by no conditions.[3] The sovereign alone can make and repeal laws,[4] impose and remit taxes.[5] On principle it would seem that his subjects could have no legal rights against him, nor could he be under any legal duties to them; but Bodin is here a little inconsistent with his own principles in admitting, contrary to the opinion of some lawyers, that such rights might exist.[6] It is fully admitted that the sovereign is bound by the rules of morality and religion;[7] but of course he is accountable for their breach to God alone.[8] Bodin by the light of this new theory could group his classical and mediæval instances, and his citations of classical and mediæval speculations, and use them to illuminate the new political conditions, and the new political problems of the sixteenth century.

Those who had clearly grasped this theory could not only solve all questions as to the extent of the powers of the state, they could also answer all questions as to the nature and binding force of law. Law was no longer a rule of conduct which taught

[1] Bk. i c. viii p. 90, "La souveraineté n'est limitee, ny en puissance, ny en charge, ny à certain tempes;" p. 93, "La souveraineté donnee à un Prince soubs charges et conditions, n'est pas proprement souveraineté, ny puissance absolue."

[2] Ibid 96, 97, "Si donc le Prince souverain, est exempt des loix de ses predecesseurs, beaucoup moins seroit il tenu aux loix et ordonnances qu'il fait: car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy, non plus que commander à soy mesme chose qui depende de sa volonté."

[3] Ibid 97-100, see, however, below n. 6, for a confusion between legal and moral duty in the view Bodin takes of contracts made between sovereign and subject.

[4] Ibid c. x p. 163, "Soubs ceste même puissance de donner et casser la loy, sont compris tous les autres droits et marques de souveraineté."

[5] See a summary of the various marks of sovereignty, Bk. i c. x pp. 163, 164; among them is the right "imposer ou exempter les sujets de charges." It is true that in another passage (Bk. i c. viii p. 102) he says, somewhat inconsistently, that "Les autres Roys n'ont pas plus de puissance que le Roy d'Angleterre; par ce qu'il n'est en la puissance de Prince du monde, de lever imposts à son plaisir sur le peuple, non plus que prendre le bien d'autruy;" as to this cp. Pollock, History of the Science of Politics 54.

[6] Bk. i c. viii p. 112, "Qui est pour respondre aux docteurs canonistes, qui ont escrit que le Prince ne peut estre obligé que naturellement: parce que disent-ils, les obligations sont de droit civil: qui est un abus;" Bodin holds that the view that the fact that the sovereign is bound by his contract is not contrary to the principle of sovereignty for God himself is bound by his promise—a clear confusion between moral and legal obligation, and a curious reminiscence of the mediæval view that absolute power does not include a freedom to do what is morally wrong, cp. vol. ii 253 and n. 12, 435.

[7] See e.g. Bk. i c. viii p. 97, "Quant aux loix divines et naturelles, tous les Princes de la terre y sont sujets, et n'est pas en leur puissance d'y contre venir, s'ils ne veulent estre coupable de leze majesté divine, faisant guerre à Dieu."

[8] Ibid 91, "Prince souverain, qui n'est tenu rendre conte qu'à Dieu."

men "honeste vivere, alterum non lædere, suum cuique tribuere."[1] Rather it was *quod principi placuit*—the command of the sovereign.[2] Customary law was only law so long as he suffered it to exist.[3] Both the existence of law and its contents depended upon him alone; and in this fact the whole essence of sovereignty was summed up.[4]

Thus for the old conception of the state, which rested upon the idea that it was made up of head and members, and existed to execute justice and maintain truth, there was substituted a new conception of the state which rested upon the idea that its being was embodied in its sovereign, and that it existed to carry out that sovereign's will. For the moral purpose which was at the back of the mediæval conception, there was substituted the force which the sovereign could command. The rules of Divine or moral or natural law which, according to mediæval notions, bound the whole state, rulers and subjects alike, withered under a conception which identified state with sovereign, and law with the sovereign's command. The sanction of Divine law gave an added glory to the sovereign as God's immediate agent; and his duty to govern according to the rules of morality and Divine law, being a duty owed to God alone, was a counsel of perfection which took nothing from the reality of his power.[5] The divinity which had formerly belonged to the church had been added to the state;[6] but the basis of force upon which this new state really rested made it certain that the moral consequences of this divinity would be in practice disregarded.[7]

Bodin admits that this conception of sovereignty was a new conception.[8] It was, as I have said, a generalization from the facts of his own day. It stood to the political facts of the sixteenth century in a very similar position to that in which Austin's theory of positive law stood to the legal facts existing in England in the

[1] Vol. ii 5, 6, 253, 510-511.

[2] Bk. i c. x p. 158, "Loy est le commendement du souverain touchant tous les sujets en general, ou de choses generales."

[3] Ibid 163, "Pour le faire court, la coustume n'a force que par la soufrance, et tant qu'il plaist au prince souverain. . . . Et par ainsi toute la force des loix et coutumes gist au pouvoir du prince souverain."

[4] Above 195 n. 4.

[5] Bk. i c. viii p. 118, "Si la justice est la fin de la loy, la loy œuvre de Prince, le Prince image du Dieu, il faut par mesme suite de raison, que la loy du Prince soit faite au modelle de la loy de Dieu;" for similar statements by Bossuet and Domat, see Esmein, Essays in Legal History 212, 213.

[6] Above 18-19, 192.

[7] Bk. i c. viii p. 106, Bodin points out that, as a result of attempting to restrain the sovereign, "Avient-il que le Monarque souverain, voyant qu'on luy vola ce qui luy est propre, et qu'on le veut assugetir à ses loix, il se dispense à la fin non seulement des loix civiles, ains aussi des loix de Dieu, et de nature, les faisant egales."

[8] Ibid 89, "Il est icy besoin de former la definition de souveraineté, par ce qu'il n'y a ny Juris-consulte, ny philosophe politique, qui l'ait definie: jacoit que c'est le poinct principal, et le plus necessaire d'estre entendu au traitte de la Republique."

first half of the nineteenth century. Both Bodin and Austin found themselves under the necessity of explaining the institutions and conceptions which, having come from an age which entertained very different ideas, necessarily conflicted with their theory. Just as Austin was obliged to explain the existence of customary law and case law, so Bodin was obliged to explain the existence of such institutions as the Estates General, the French Parlements, and other representative assemblies still existing in different parts of Europe. Both writers had sufficient dialectical skill to produce an explanation. Neither writer could, by the nature of the case, satisfy those who looked at phenomena from the historical rather than from the analytical standpoint. Moreover, as Bodin's theories were not, like Austin's theories, confined to the domain of purely legal speculation, they necessarily aroused the opposition of those who saw that the gift of unfettered and unlimited powers to the ruler of the state would be fatal to all liberty both political and religious.

On the historical side the best-known opponent of the new theory of the state was Hotman.[1] He was an opponent of the Romanizing tendencies of the lawyers which made for absolutism;[2] and he had no difficulty in showing from the mediæval history of France that the absolute character which the French monarchy was assuming was of recent date.[3] His arguments against absolutism, founded on the history of the Estates General and the Parlements, are not unlike the seventeenth century arguments for the rights and privileges of the English Parliament. As Figgis has pointed out, he was the earliest of the Germanists, and his book is the first of constitutional histories.[4] But in France the Estates General was not a living institution, and the power of the Parlements had been mastered.[5] In England, on the other hand, both Parliament and the law courts were living institutions with a continuous history.[6] Therefore the arguments which in England made constitutional law in France remained merely academic.[7]

[1] The book in which he most clearly put forward these views is the *Franco-Gallia;* the edition from which I cite is that of 1573; for some account of the author and his book see Gooch, English Democratic Ideas in the Seventeenth Century 11-13.

[2] For his *Anti-Tribonian*, see below 291.

[3] *Franco-Gallia* c. xviii p. 145, he thus sums up his historical argument, "Ut cunque sit, perspicuum est, nondum centesimum annum abiisse ex quo Franco-Galliæ libertas, solemnisque concilii libertas, vigebat, et vigebat versus regem neque ætate neque animo imbecillum; sed et jam annorum xl majorem, et tanta ingenii magnitudine præditum, quantam nunquam in ullo rege nostro fuisse constat. Ut facile intelligatur Rempublicam nostram libertate fundatam et stabilitam annos amplius centum et mille statum illum suum liberum et sacrosanctum etiam vi et armis adversus Tyrannorum potentiam retinuisse."

[4] Camb. Mod. Hist. iii 760. [5] Above 166-172. [6] Above 173-190.

[7] As Lureau says, Les Doctrines Democratiques de la seconde moitié du xvi^e^ siècle 172, "Franco-Gallia est l'utopie du passé;" cp. Gooch, English Democratic Ideas in the Seventeenth Century 18, 19.

As I have already pointed out it was the existence of religious dissent which enabled the struggle against the absolutism of the state to be maintained.[1] In different states both Calvinists and Catholics found themselves in opposition to the governing body in the state. The divinity claimed for the state was at different periods denied by both religious parties; and the higher claims of their respective churches were put forward in opposition to the claims of the state.[2] Thus a limitation was imposed upon the absolute powers of the state. In seeking to find a theoretical and a legal basis for this limitation recourse was had to the idea that the powers of the ruler of the state depended upon a contract or contracts between God and the ruler, and between the ruler and his subjects; and that a breach of the terms of these supposed contracts would justify resistance. Perhaps the most famous sixteenth century book in which this thesis was maintained was the *Vindiciæ contra Tyrannos*.[3] If Hotman's book has some claims to be called the earliest of our constitutional histories, this book has some claims to be called "The first work in modern history that constructs a political philosophy on the basis of certain inalienable rights of man."[4]

The argument of this and similar books is analytical, and not, like Hotman's *Franco-Gallia*, historical. But, though analytical in form, it owes a good deal more to mediæval political speculation than Bodin's new theory of the state. For the idea that a ruler might be deposed, if his conduct was such as to constitute a breach of the law of God and of nature, there was abundant mediæval authority;[5] and for the idea of a contract between ruler and subject similar authority could be found, not only in theory, but also in the feudal bargain between lord and man, which was in fact the source of much political power in the Middle Ages.[6] These

[1] Above 21-22.

[2] See this clearly and fully explained in a paper by Mr. Figgis on Some Political Theories of the Early Jesuits, in Royal Hist. Soc. Tr. (N.S.) (1897) xi 89-112. Mr. Figgis says at p. 93 "Knox, Goodman, Buchanan, and Cartwright held a theory of the subjection of the civil to the ecclesiastical power hardly distinguishable from the Jesuit doctrine;" see below 216.

[3] This book was written either by Languet or by Duplesis-Mornay, or perhaps by both, see Gooch, English Democratic Ideas in the Seventeenth Century 13, 14.

[4] Gooch, op. cit. 16—as he says, "Its relevance was not confined to France. It was utilized by, even if not specially composed for, the United Provinces, was quoted to justify the trial and execution of Charles I. and reprinted to justify the Revolution of 1688;" Lureau, Les Doctrines Democratiques de la seconde moitié du xvi[e] siècle 58 says, "Il pose d'abord le droit de non-obéissance, puis le droit de résistance, d'abord dans les limites de la loi réligieuse, ensuite au point de vûe purement politique;" the argument is summarized by Figgis, Camb. Mod. Hist. iii 760-764; the idea of a compact is of course adopted by many other writers, one of the most famous of whom is Althusius, Politica Methodice digesta—see especially c. xv.

[5] Gooch, op. cit. 21.

[6] Camb. Mod. Hist. iii 762.

rival theories of the state rested therefore upon a combination and an adaptation of these two sets of mediæval ideas.

Both Hotman and the analytical writers aimed at attaining a similar result by different methods. The aim of Hotman's teaching was the restoration of the institutions which could check the power of the king. The aim of the authors of the *Vindiciæ contra Tyrannos*, and other similar writings, was the restoration of the idea that subjects had certain moral or natural rights of which they could not be deprived by the ruling power of the state; and, consequently, that a disregard of those rights would justify resistance.[1] It followed that the command of a sovereign king was not necessarily a binding law. According to one view the king could not legislate without the consent of his Estates: according to the other view his command must not infringe those natural or moral rights of his subjects which the state's law could not override.[2]

But the idea of these overriding natural or moral rights long remained unfruitful for the same reason as that which rendered Hotman's historical arguments academic. The institutions which might have given them support, and rendered them fruitful of practical consequences, had gone down before the encroachments of royal power. It was only in the sphere of international law, which was rendered possible by their existence, that this idea was able in the sixteenth and seventeenth centuries to exercise any large influence upon the politics of continental Europe.[3] In the sphere of municipal politics it preserved indeed the tradition of political liberty;[4] but it was not till the period of the French Revolution that it began again to exert a practical influence upon the theory of the state and its activities. For the present, and for many years to come, the state is embodied in and represented by its sovereign, and the law is dependent upon his command.

As we might expect from the differences in their constitutional development, the position of the king in England, and the theory

[1] Mr. Figgis points out, Royal Hist. Soc. Tr. (N.S.) (1897) xi 103, that according to the Jesuit doctrine, "Whether on the general ground of the supremacy of the Church, or on the theory of a tacit contract, the conclusion is equally clear that the Pope, acting as God's Vicar, may depose kings and release subjects from their allegiance, if that be necessary for their salvation;" cp. Esmein, Essays on Legal History 210, 211 for an attempt by Charondas le Caron to demonstrate, "comme Bracton . . . que le Prince doit respecter la loi parce qu'il ne règne que par elle;" and like Hooker, below 213-214, to prove that law, being the normal rule of all reasonable beings, the king should govern in accordance with it.

[2] "Law is regarded not so much as dependent on the will of the law-giver as an attempt to realise under political conditions the teachings of natural law, the ideal to which all States should conform, and to ensure the reign of general utility and justice," Royal Hist. Soc. Tr. (N.S.) xi 107; "the law is for them endowed with Divine Right, eternal and immutable, the breath of God rather than man, controlling sovereign and subject alike," Figgis, Divine Right of Kings 113.

[3] Above 22; below 289-290; vol. v 26-27.

[4] Camb. Mod. Hist. iii 768, 769; above 197-198.

of the English state, are very different from the position of the continental king and the prevalent continental theory of the state.

In England, as in France, the idea that the king was superior to any ordinary feudal lord had been, from the thirteenth century onwards, present to the minds of English lawyers.[1] In both countries the progress of this idea had been checked by the recrudescence of feudal turbulence in the fourteenth and fifteenth centuries. But in the sixteenth century, both in England and abroad, it had begun to develop with the development of the independent territorial state, and with the definite subordination of the church to the state.[2] The king of England, like his continental brethren, became the leader, the representative, the embodiment of the state—"the light and life of the commonwealth,"[3] in whom "the entire personality of the nation was wrapped up;"[4] and from the reign of Henry VIII. he had been the supreme head under God of the church. The state, to which the church was now subordinate, had necessarily taken upon itself the character of a divine institution; and the king as its head could therefore lay claim to a divine appointment.[5] These developments of the kingly office are found both in England and abroad. But at this point the parallel between the English and the continental development ceases. The English king was the representative of the state, his prerogative was the source of the executive authority in the state, and he and this Council had large judicial powers; but he was not the sole source of all authority. The state was conceived, not as centering in him alone, but as consisting of a body politic composed of himself as head, and the three estates of his realm as members.[6]

That English statesmen and publicists and lawyers of the sixteenth century stopped short of conferring upon the king the whole authority of the state was due in the first place to the peculiar development of English institutions, and in the second place to the peculiar position of the English common law. We have seen that the growth of the powers and privileges of Parliament in the fourteenth and fifteenth centuries had safeguarded and given a very practical meaning to the mediæval idea of the supremacy of the law.[7] Consequently the prerogative was limited in the first place

[1] Vol. ii 253; vol. iii 463-469. [2] Above 190-192.

[3] Third Instit. 18; note that 1 Mary Sess. 3 c. 1 declared that the attributes of the office of king were the same whether the office was vested in a male or a female; this Act was no doubt due to the unpopularity of the Spanish match, and, as Mr. Tanner says, "it finally disposed of the doctrine that a woman could not succeed to the throne of England in her own right," Constitutional Documents 123.

[4] L. and P. ii Introd. lxv. [5] Above 192, 196; below 215-216.

[6] Fourth Instit. 2, "the king and these three estates are the great corporation or body politick of the kingdom;" see above 184 n. 3 for earlier and similar statements.

[7] Vol. ii 441-443; above 187-189.

by the powers and privileges of Parliament when Parliament was sitting, and in the second place, it was limited at all times by the fact that its extent was defined by the law.

(i) We have seen that the powers and privileges of Parliament were respected even by Henry VIII. In *Ferrers's Case* he recognized that his powers when acting with Parliament were far larger than his powers when acting without Parliament.[1] It was quite clear that it was only with its consent that taxes could be imposed and new laws made.[2] These powers of Parliament were recognized by Sir Thomas Smith and by all other writers on the English constitution of this period.[3] It followed, therefore, that though the king had large powers, he was not all-powerful.

(ii) The Tudor kings might on occasion pervert the law; but they respected it. For their most arbitrary acts they always endeavoured to get a legal sanction. Both the king and his Council frequently took the opinion of the judges and their law officers;[4] and thus by implication they admitted that their acts should be governed according to law. That this was generally understood even by Henry VIII. comes out very clearly in the very characteristic tale which, as we have seen, was related by Gardiner to the Protector Somerset.[5] Its truth is borne out both by the character of Henry VIII.'s ecclesiastical settlement,[6] and by the general opinion of his subjects.[7] Bacon, in his argument in *Calvin's Case*, explained that "Law is the great organ by which the sovereign power doth move;" and that towards the king it had a double office to perform. In the first place it defined his title. In the second place it made "the ordinary power of the king more definite and regular;" for, "although the king, in his person, be *solutus legibus*, yet his acts and grants are limited by law, and we argue them every day."[8] The supremacy of the

[1] Above 91-92. [2] Above 99, 104.

[3] For Smith and his book see below 209-212; for other writers see Hallam, C.H. i 279-282, and below 216; in Henry VIII.'s reign these constitutional doctrines were strongly emphasized in Starkey's account of England in the reign of Henry VIII. (E.E.T.S.); he even advocated a council, "not such as he (the Prince) wyl, but such as by the most partie of the parlyament schal be jugyed to be wyse and mate thereunto;" and, though "the grate Parlyament" is to be seldom called, there is to be a permanent council to control the king and "hys propur counsele" when it is not sitting, p. 169.

[4] See L. and P. vi nos. 1445, 1460 for a difference of opinion between the king and the judges as to the Nun of Kent's case.

[5] Above 102.

[6] Above 36, 37; vol. i 589-591, 596-598.

[7] "It had never been seen," wrote Hussee to Lord Lisle in 1538, "that the king would stop the course of his common law," L. and P. xiii *i* no. 1333; Starkey's Book was dedicated to Henry VIII., and he could write (p. 181) that the laws "must rule and governe the state, and not the prynce after his own lyberty and wyle;" see also below 274, 283-284.

[8] Works (ed. Spedding) vii 646; and cf. "A brief discourse upon the commission of Bridewell," ibid 509-516.

law was a theme on which Coke was never tired of dilating.[1] In fact, it would not be going too far to say that it was the view of all the leading lawyers,[2] statesmen, and publicists[3] of the Tudor period.

To give legal expression to the constitutional position of a king, who was the head and representative of the state, and yet not possessed of uncontrolled power within it, was by no means an easy task; and the difficulty was increased by the fact that the Tudor lawyers were also obliged to reconcile older legal doctrines as to the position of the king, which came from a time when the state was still to some extent dominated by feudal ideas,[4] with the new position which the king was assuming in the modern state.

As the basis of their exposition (i) they elaborated the few hints which they found in their mediæval books as to the existence of a distinction between the natural and the politic capacity of the king. (ii) They supplemented this distinction (*a*) by laying some stress upon the difference between prerogatives which were inseparable from the person of the king, and prerogatives which were not,[5] and (*b*) by applying to these prerogatives the distinction, familiar from its application to the jurisdictions of the Chancellor, between absolute and ordinary power.[6]

(i) The distinction between the natural and politic capacity of the king was elaborately stated in the case of the Duchy of Lancaster which was decided in 1562.[7] "The king," it was there said,[8] "has in him two bodies, viz. a body natural, and a body politic. His body natural (if it be considered in itself) is a body mortal, subject to all infirmities that come by nature or accident, to the imbecility of infancy or old age, and to the like defects that happen to the natural bodies of other people. But his body politic is a body that cannot be seen or handled, consisting of policy and government, and constituted for the direction of the people, and the management of the public weal; and this body is

[1] See e.g. The Case of Proclamations (1611) 12 Co. Rep. at p. 76, "the king hath no prerogative, but that which the law of the land allows him;" cf. Second Instit. 36, 186; Third Instit. 84.

[2] Plowden Rep. 236, "Although by the common law the king has many prerogatives touching his person, his goods, his debts, and duties, and other personal things, yet the common law has so admeasured his prerogatives, that they shall not take away nor prejudice the inheritance of any;" Cavendish's Case, Anderson's Rep. 152-158.

[3] Above 201 n. 3; below 216. Onslow, the speaker in 1566, said "by our common law, although there be for the Prince provided many Princely Prerogatives and Royalties; yet it is not such, as the Prince can take money, or other things or do as he will at his own pleasure without order; but quietly to suffer his subjects to enjoy their own, without wrongful oppression, wherein other Princes by their liberty do take as pleaseth them," D'Ewes 185.

[4] Vol. iii 460-469. [5] Below 204-206.

[6] Vol. ii 596-597. [7] Plowden 212. [8] At p. 213.

utterly void of infancy and old age, and other natural defects and imbecilities, which the body natural is subject to, and for this cause, what the king does in his body politic cannot be invalidated or frustrated by any disability in his natural body." The king, therefore, "has a body natural, adorned and invested with the estate and dignity royal. . . . So that the body natural, by the conjunction of the body politic to it (which body politic contains the office, government, and majesty royal) is magnified." [1]

This speculation as to the separation of the natural and politic capacity of the king helped to express his new position as head and representative of the state. It naturally suggested to the lawyers the distinction, with which they were becoming familiar, between corporate and natural personality; [2] and led them to talk of the king as a corporation sole, and to compare him to a bishop, an abbot, a prior, or a parson.[3] As Bacon pointed out, the analogy was not exact, for the king was both natural man and the head of the body politic.[4] In spite of this objection it is possible that, if the English king had ever become identified with the state, something might have been made of the idea that the king was a corporation sole.[5] But in England in the sixteenth century no statesman or lawyer ever thought of suggesting this identification —he and his subjects together were the "great corporation or body politick of the kingdom." [6] Since, however, the king, as the head and representative of the state, was given a new and peculiar position within the state, it was clear that the old list of semi-feudal privileges, contained in such documents as the Praerogativa Regis,[7] would no longer serve as a complete statement of the law. No doubt this old list of privileges, as interpreted by the Year Books, served well enough for the ordinary cases in which the king's prerogatives came before the courts; and a summary of the law grouped round this so-called statute was written by Staunford.[8]

[1] Plowden, at p. 213; cf. Willion v. Berkeley, Plowden 223 at p. 234; a good summary of the law as here stated is given by Bacon in his argument in Calvin's Case, Works (ed. Spedding) vii 667, 668.

[2] Vol. iii 470-490; Pt. II. c. 6 § 2.

[3] Vol. iii 481-482; Pt. II. c. 6 § 1; at Westminster, for instance, the abbot and prior were separate corporations, see 28 Henry VIII. c. 49 § 3.

[4] Works, vii 668, "Let us see what operations the king's natural person hath upon his crown and body politic: of which the chiefest and greatest is, that it causeth the crown to go by descent; which is a thing strange and contrary to the course of all corporations, which ever more take in succession and not by descent. . . . And therefore here you may see what a weak course that is, to put cases of bishops, parsons, and the like, and to apply them to the crown. For the king takes to him and his heirs in the manner of a natural body, and the word *successors* is but superfluous."

[5] Pt. II. c. 6 § 1. [6] Above 200 n. 6, 184 n. 3; Fourth Inst. 2.

[7] Vol. iii 460-461; for this so-called Statute see vol. i 473 n. 8; vol. ii 223.

[8] "An exposicion of the kinges prerogative collected out of the great abridgement of Justice Fitzherbert and other older writers of the lawes of Englande, by the right woorsshipfull Sir William Staunford knight, lately one of the Justices of the Queenes majesties court of common pleas; whereunto is annexed the Proces to the same

But, as Staunford recognized,[1] it did not tell lawyers or politicians anything of the new position in the state which the king and his prerogative were taking. A re-statement of the law on this topic was wanted in order to bring it into conformity with the facts and the needs of the day. But to make this new statement some more definite doctrines must be evolved than this somewhat abstract reasoning as to the consequences of the king's double capacity. Some practical deductions must be drawn from it.

(ii) The two chief ideas which the lawyers used for the purpose of drawing these deductions were (*a*) the idea of an inseparable prerogative, and (*b*) the idea of the distinction between absolute and ordinary power.

(*a*) To the king in his politic capacity certain powers were said by the lawyers to be inseparably annexed. We can distinguish two different shades of meaning which were attached to this term "inseparable." Firstly, it was used to mean a right or power which was peculiar to the king, and could not therefore be granted to another person. Thus the right to appoint justices of the peace, to pardon crimes, to create denizens,[2] or to dispense with breaches of statutes which might be committed in the future, could belong to the king and to the king only.[3] This idea had appeared at an early date. Bracton had used it to demonstrate the illegality of the possession of jurisdiction by private persons;[4] and the judges of the sixteenth century used it to demonstrate the illegality of various grants of royal rights, and of licences to enjoy the forfeiture arising from the breach of penal statutes, or to compound for their breach.[5] The learning upon this meaning of the term "inseparable" was summed up by Coke in the *Case of Penal Statutes*,[6] and the *Case*

Prerogative appertaining;" it was published in 1568, but the dedication to Nicholas Bacon, "the kinges attourney of his court of Wardes and Liveries," is dated Nov. 6 1548; for Staunford see vol. v 380, 392.

[1] Vol. iii 460.

[2] Y.B. 20 Hy. VII. Mich. pl. 17—a case which turned on a claim of the Abbot of St. Albans to appoint justices of the peace—Fineux C.J. said that this "est chose annex al crown et ne peut etre severe, et, come de grant de pardonner felons ou de faire denizens, est void;" cf. Y.B. 10 Hy. VII. Hil. pl. 6—a grant of omnia jura Regalia must be interpreted according to the old allowance; 42 Ass. pl. 49—a grant to hear all manner of pleas would not give a right to hear the assizes; cp. also Y.B. 5 Ed. IV. p. 123 *per* Yelverton.

[3] The Case of Penal Statutes (1605) 7 Co. Rep. 36, "When a statute is made *pro bono publico*, and the king . . . is by the whole realm trusted with it; this confidence and trust is so inseparably joined . . . to the royal person of the king . . . that he cannot transfer it to the disposition or power of any private person."

[4] Vol. i 87; Bracton ff. 15a, 55b. The idea also appears in another slightly different form; some rights might be granted to a private person, but, if granted, they could not exist in the hands of a private person in the form in which they existed when they belonged to the king, see Y.B. 14 Hy. IV. Mich. pl. 6 p. 9—"Le grantee de Roy ne sera la meme condition que le Roy fuit, car le Roy avera la gard de son tenant coment que il tient de luy en posteriority. Mes si le Roy grant le Seigneurie a un auter comon person, il ne sera de meme le condition que le Roy fuit."

[5] Below 358-359.

[6] Above n. 3.

of the King's Prerogative in Saltpetre.[1] Secondly, it was used in connection with the dispensing power to express a logical difficulty which the lawyers felt as to the possibility of taking away the prerogative to dispense with a statute, even by Act of Parliament. If, it was said, the king has, by virtue of his office as king, a power to dispense with Acts of Parliament, how can this power be restrained? If the Act restrains dispensation with itself, the power to dispense with that restraint still exists, *non obstante* the restraint.[2] This prerogative is therefore inseparable. The learning upon this meaning of the term was summed up by Coke in the *Case of Non Obstante.*[3]

The idea of an inseparable prerogative was therefore a vague idea; but because it was vague it was capable of development. Any part of the prerogative which seemed to be an essential attribute of royal power could be dubbed "inseparable;"[4] and the doubt as to the capacity of an Act of Parliament to take it away, which had been applied originally only to the logical difficulty felt in the case of the dispensing power, could be given a wider significance. The manner in which Coke in his usual fashion had generalized from and embellished his authorities made it possible to cite his authority for such an extension.[5] Therefore in the following century, when the powers of the prerogative and the powers of Parliament were arrayed over against

[1] (1607) 12 Co. Rep. at p. 13—"The taking of saltpetre is a purveyance of it for the making of gunpowder for the necessary defence and safety of the realm. And for this cause, as in other purveyances, it is an incident inseparable to the Crown, and cannot be granted, demised, or transferred to any other."

[2] Y.B. 2 Hy. VII. Mich. pl. 20; from this case Bacon, Maxims of the Law, Works (ed. Spedding) vii 370, deduces the following proposition: "If there be a statute made that no sheriff shall continue in his office above a year, and if any patent be made to the contrary it shall be void; and if there be any *clausula non obstante* contained in such patent to dispense with the present act, that such clause also shall be void; yet nevertheless a patent of a sheriff's office made by the king for term of life, with a *non obstante*, will be good in law, contrary to such statute which pretendeth to exclude *non obstantes:* and the reason is, because it is an inseparable prerogative of the crown to dispense with politic statutes, and of that kind;" cf. Plowden 502; the last trace of this idea appears in the phrasing of § xii of the Bill of Rights; cf. D'Ewes 168—the speech of Humphrey Gilbert; the difficulty is somewhat analogous to the difficulty of conceiving an Act by which a sovereign body can effectually limit its own powers.

[3] 12 Co. Rep. 18.

[4] Thus in Bates's Case (1606) 2 S.T. at p. 383, Clark B. said, "As it is not a kingdom without subjects and government, so he is not a king without revenues. And the revenue of the crown is the very essential part of the crown, and he who rendeth that from the king pulleth also his crown from his head, for it cannot be separated from the crown."

[5] Thus in the case of Non Obstante 12 Co. Rep. 18, he said, "No act can bind the king from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *non obstante*; as a sovereign power to command any of his subjects to serve him for the public weal; and this solely and inseparably is annexed to his person; and this Royal power cannot be restrained by any Act of Parliament, neither in *thesi* nor in *hypothesi*, but that the king by his royal prerogative may dispense with it."

one another, this idea of an inseparable prerogative acquired a political importance, because it could be used to support the proposition that the prerogative as a whole was superior even to an Act of Parliament, and that an Act of Parliament which purported to take it away was a void Act.[1] The idea had not acquired this importance in the sixteenth century. It was used either to express the fact that certain parts of the prerogative were such essential parts of the conception of the prerogative that they could not be vested in any other than the king, or to denote the logical impossibility of taking away his power to dispense with statutes.[2]

(*b*) The king's prerogative was subject to the law; but there was a wide sphere within which the king could act as he pleased. Thus as supreme head of the church he had wide powers over all ecclesiastical matters; as representing the nation in its dealings with foreign nations he was free to act as he pleased; in times of war and insurrection he must take what measures seemed good to him to restore law and order. Obviously there was a distinction between the doing of such acts as to which he had an unfettered discretion, and the doing of acts, such as the issue of proclamations, the making of grants, or the seizure of property, for which the law had prescribed conditions. To express this distinction the law borrowed the terms "absolute" and "ordinary," which had already been applied to express the distinction between the cases in which the jurisdiction of the Chancellor was bound by the straight rule of the common law, and the cases in which it was not.[3] Thus the term "absolute" when applied to the king did not mean that he was freed generally from legal restraint; but merely that as to the particular act to which the adjective was applied he had a free discretion as to the question whether he would do it at all, or, if he wished to do it, as to how he would do it.[4] But the term "absolute," even more than the term "in-

[1] The Case of Ship-money (1637) 3 S.T. at p. 1235, "No act of Parliament can bar a king of his regality," *per* Finch C.J.; cf. ibid at p. 1085 *per* Crawley J.

[2] Thus in the Case of Mines (1568) 1 Plowden at p. 335, some, arguing for the crown, "affirmed that this mine, being a mine royal, could not be granted or severed from the crown even by express words, for it is an incident inseparable to the crown as escheats for treason are;" but this was denied, and nothing was said of this point in the judgment; it would seem that "inseparability" cannot be predicated of the prerogative as a whole, but only of certain parts of it.

[3] Vol. ii 596-597.

[4] See the instances given by Mr. Alston in the Introd. to his edition of Smith's Republic xxxi, xxxii. Smith talks of the Prince's absolute power in time of war, his absolute power over the coinage, or over foreign affairs, and of the absolute character of the judgments of Parliament; in all these cases Mr. Alston says the term means "without appeal;" I should rather prefer to say that it means an authority the exercise of which cannot be called in question by any legal process, i.e. there exists what we should call an absolute discretion. Thus Lambard, Archeion 136, talks of hearing a case, "by absolute authority without prescribed rule of ordinary proceedings;" Coke, Caudrey's Case (1591) 5 Co. Rep. at p. 40b, says that the "kingdom of England is an absolute monarchy," by which he means that it is not

separable," gave countenance to the idea that the king had a large and indefinite reserve of power which he could on occasion use for the benefit of the state;[1] and the constitutional controversies of the seventeenth century gave a very definite meaning to this idea.[2] The older authorities knew of the particular parts of the royal prerogative which were absolute, and particular parts of the prerogative which were inseparable; but their words were not always very precise;[3] and this want of precision enabled the prerogative lawyers of the seventeenth century to deduce from their statements concerning these particular absolute or inseparable prerogatives the theory that the king had, inseparably attached to his person, a general absolute prerogative to act as he pleased, which he could use whenever he saw fit.[4]

No such deductions were drawn by the lawyers and statesmen of the sixteenth century. They recognized that the king had a politic capacity, and that in that capacity he was the head and representative of the state. To that capacity certain powers were inseparably annexed—they were, that is, implicit in the idea of kingship, and therefore inseparable from the person of the king. As to the mode of user of some of these powers the king's discretion was free—he had an absolute prerogative. The mode of the user of others was prescribed by law. They could therefore be called ordinary because they were subject to the ordinary conditions of compliance with the law. The king himself was not amenable to the law,[5] and the exercise of any of his absolute prerogatives could not be called in question in a law court. But, subject to these

subject to the jurisdiction of the pope or other foreign prince; Wray, the speaker in 1571, said that over ecclesiastical causes, "her Majesty's power is absolute," D'Ewes 141; sometimes the word is used in its modern sense, e.g. Sir H. Gilbert made the statement that, "other kings had absolute power as Denmark and Portugal," D'Ewes 168; but this was not said by a lawyer; the legal use is that indicated above; and that this is so can be further illustrated by a passage from Lambard, Justices of the Peace Bk. I c. xi (cited Alston, op. cit. xxxii); Lambard there says that he is using "absolute power" in the sense of "discretion," and draws the distinction between a discretion to be exercised "simply," and a discretion to be exercised "after a manner;" this really answers to the modern distinction between a discretion and an absolute discretion.

[1] The adjective "royal" is sometimes used in a similar way, see the statement in the preamble of 31 Henry VIII. c. 8, "not consideringe what a kinge by his royall power may doe;" Select Cases in the Star Chamber (S.S.) i 37, 46, "Riall" is used to signify "absolute" power.

[2] Bates's Case (1606) 2 S.T. at p. 389, Fleming C.B. said, "the absolute power of the king . . . is that which is applied to the general benefit of the people and is *salus populi*;" cf. the Case of Ship-money (1637) 3 S.T. at p. 1083, "In the king are two kinds of prerogative *regale* et *legale*," *per* Crawley J.

[3] Thus the statement in Willion v. Berkley (1561) Plowden 234, above 184 n. 3, that the king "is the head," and "that he has the sole government" could be easily made the starting point of another theory which regarded the king as corporation sole, and, in accordance with the continental idea, identified king and state.

[4] Vol. vi c. 6. [5] Vol. ii 253; vol. iii 465.

qualifications, both the extent of the prerogative and the mode of its user was subject to certain legal limitations which the law courts must interpret.[1]

The English king therefore was far from being the sovereign power in the state. Nor do I think that any lawyer or statesman of the Tudor period could have given an answer to the question as to the whereabouts of the sovereign power in the English state. The doctrine of sovereignty was a new doctrine in the sixteenth century; nor is it readily grasped until the existence of a conflict between several competitors for political power makes it necessary to decide which of these various competitors can in the last resort enforce its will.[2] There is a negative element about the doctrine of sovereignty as well as a positive. We must be able to assert, not only that the sovereign is the person or body to whom the bulk of his subjects are in a state of habitual obedience, but also that he or they are not in a state of habitual obedience to any; and it is not until this conflict has arisen, and has been decided, that men see the necessity for the denial as well as the assertion. For it is not until then that men are driven to consider either the precise extent of the power of the ruler of the state, or the question whether or no it is shared by any other person or body within the state. Till then general assertions as to the supremacy of some particular person or body of persons will serve. It is such a general assertion of the supremacy of the king in Parliament that we get in Sir Thomas Smith's work. No controversy had as yet arisen as to the extent of the powers of the king or the powers of Parliament.[3]

[1] Perhaps the best short summary of the actual state of the law in the sixteenth century will be found in Hooker, Ecclesiastical Polity Bk. viii § 2, 17.

[2] Sir F. Pollock, History of the Science of Politics (Ed. 1911) 57, holds that Smith, in his famous passage on the powers of Parliament, above 181-182, and elsewhere, did intend to assert that the king in Parliament was the sovereign power in the state "one is tempted to think he must somehow have had knowledge of Bodin's work;" see also a First Book of Jurisprudence (4th Ed.) 263-264. Mr. Alston, op. cit. xxix-xxxiv disagrees; he says at p. xxxiii, "Smith in declaring Parliament to be the most high and absolute power of the realm (in time of peace) is by no means bringing up for consideration the question of sovereignty in the modern sense, or making statements which have any direct bearing on the great controversy of the next century. Probably he has not seriously thought of the king as likely to come into opposition with the Houses in time of peace, any more than as likely to come into opposition with the rest of the army in time of war. The king is most powerful *when* he is at the head of his army or *when* he is presiding over his Parliament;" Figgis, Camb. Mod. Hist. iii 748 says of Smith, "The whole standpoint is nearer that of Bracton than that of Bodin;" cf. Gooch, Democratic Ideas in the Seventeenth Century 37, 38; having regard to the manner of the development of English institutions in the sixteenth century, and the legal doctrines underlying them, I am inclined to agree on this point with Mr. Alston rather than with Sir F. Pollock. On the other hand, I do not think that Smith thought of Parliament as a judicial court, above 182-184; below 211; on this matter I agree with Sir F. Pollock.

[3] As Mr. Gooch says, Democratic Ideas in the Seventeenth Century 38, "the conduct of the Parliaments of the reign (of Elizabeth) exhibits the interesting spectacle of a stout determination to have their way on questions of importance, combined with a tacit understanding that first principles shall be left alone."

He does not contemplate the existence of a controversy between them. All that he means to do is to assert that the king together with his Parliament can exercise supreme authority in the state.

The unique continuity and the peaceful character of the development of English institutions and English law throughout this century had led to the retention of mediæval ideas as to the relation of the king to the law and government of the state, which were quite opposed to the new theory of sovereignty. It was to Bracton's book, rather than to any more modern authority that lawyers and statesmen of all opinions appealed. Thomas Cromwell,[1] and the upholders of the prerogative in the Elizabethan Parliaments, appealed to Bracton's book to prove that the king was the vicar of God and supreme in his realm;[2] while throughout the century lawyers and the upholders of the rights and privileges of Parliament appealed to the same authority to prove that the king's acts were governed by a supreme law.[3] Though English institutions had been adapted to the needs of an independent territorial state of the modern type, the theory of the English state was as yet very mediæval in its character. Even in the ecclesiastical sphere the Reformation had made, officially, no break with the past.[4]

The manner in which mediæval institutions had been adapted, with the minimum of change, to suit a modern state is clearly brought out in Sir Thomas Smith's famous book on the Republic of England; and the manner in which mediæval ideas had been similarly adapted is equally clearly brought out in Hooker's great work on Ecclesiastical Polity. It is from these books that the theory of the English state at the close of the sixteenth century can most clearly be seen.

Sir Thomas Smith[5] (1513-1577) was by no means the least distinguished of the many-sided men who helped to govern England in the reign of Elizabeth. In Henry VIII.'s reign he had made his name as a classical scholar at Cambridge. In 1540 he was created the first regius professor of civil law in that University. He went abroad to study his subject, and became a

[1] L. and P. xii *i* no. 1038, Denys, writing to Cromwell, says that Cromwell had caused him and Kingston to read Bracton, in which the king is called Vicarius Christi.

[2] In the Parliament of 1601 Cecil said, "If you stand upon law and dispute of the prerogative, heark ye what Bracton saith, Praerogativam nostram nemo audeat disputare," D'Ewes 649.

[3] See e.g. D'Ewes 238, Wentworth cited Bracton to prove that the king, "ought not to be under man, but under God and under the law, because the law maketh him a king . . . he is not a king in whom will and not the law doth rule, and therefore he ought to be under the law;" cf. Bacon's argument in Calvin's Case, Works (ed. Spedding) vii 646, where a very similar use is made of Bracton's authority.

[4] Vol. i 589-591; above 36, 37.

[5] These facts have been taken from Maitland's Preface to Alston's Ed. of Smith's Republic, and from the Dict. Nat. Biog.

doctor in law of the University of Padua. A staunch supporter of the Reformation, he entered the service of the state in the reign of Edward VI. "He became clerk of the privy council, steward of the stannary courts, a master of the court of requests, provost of Eton, Dean of Carlisle, and in 1548 one of the two secretaries of state."[1] He was attached to the protector Somerset, and lost his professorship and secretaryship at his fall. In Mary's reign he lost the provostship of Eton and the Deanery of Carlisle; but he received a pension in lieu of these offices, and the friendship of Gardiner protected him from further molestation during her reign. He became prominent once more in Elizabeth's reign. He was on the commission which sat to consider the business to be brought before the Parliament of 1559, and he represented Liverpool in that Parliament. From 1562-1566 he was ambassador in France. He became a privy councillor in 1571, and secretary of state in 1572. In the latter year he again sat in Parliament, and became chancellor of the order of the Garter. He died in 1577.

Smith was not only an eminent public servant, he was also a classical scholar, a physician, a mathematician, an astronomer, an architect, an historian, and an orator. But it is none of these accomplishments that gives him a place in English legal and constitutional history—it is his little book on the Republic of England, written, like Fortescue's De Laudibus,[2] when he was in France. The book was first published in 1583, and it ran through eleven editions in a little over a century. It was translated into Latin, and in its Latin dress four editions were published.[3] To the editions of 1583 and 1584 the editor and publisher appended notes. In the former edition the notes are mainly legal: in the latter they are mainly etymological.[4]

Smith set himself to "declare summarily as it were in a chart or mappe . . . the forme and manner of the government of Englande and the policie thereof, and sette before your eies the principall pointes wherein it doth differ from the policie or government at this time used in Fraunce, Italie, Spaine, Germanie and all other countries, which doe followe the civill lawe of the Romanes." He has given us, as he says, a true account of an actually existing commonwealth; and he points out that a comparison between this commonwealth of England and the commonwealths of neighbouring states would "be no illiberal occupation for him that is a philosopher," nor, "unprofitable for him who hath to doe, and hath good will to serve the Prince and the

[1] Maitland's Preface ix. [2] Vol. ii 569-570.
[3] Alston's Ed. App. A 144-147.
[4] Alston, Introd. xlv-liii; Maitland App. A 147-167 gives a very full and clear account of additional notes made to the 1589 Edition.

commonwealth."[1] The book is, therefore, as Mr. Alston says, "a pioneer treatise in comparative politics."[2] And it is probable that Smith has emphasized in his sketch the points of contrast with foreign governments. The Privy Council—the real governing body of the country—is hardly mentioned.[3] But foreign states were well acquainted with similar bodies. One great contrast between the English state and the continental was the fact that England was still governed by many courts of mediæval origin, and by a common law which was wholly peculiar to itself. This is the reason why "to Smith the constitution of a commonwealth consists primarily of its courts and its various forms of law—martial, ecclesiastical and general;" and why the "regularly recurring contrast" is between England and countries governed by the civil law.[4] But another equally great contrast between the English and the continental state was to be found in the unique sphere occupied by the English Parliament. Its existence and activities presented quite as great a contrast to the institutions of foreign countries as the English courts and the English common law. I think that it was mainly for this reason that Smith so fully describes it. It was no doubt a court; and it possessed some of the attributes of a court. But it was because it was unique, and not because Smith thought of it primarily as a court, that he gives it so important a place in his book.[5]

Though the comparative point of view which Smith adopts led him to emphasize certain of the institutions of the English state, and to neglect others, we cannot accuse him of over-emphasis. The fact that the greater part of the institutions of the English government could be best described under the rubric "Justice and Police" is obvious from the literature of the subject. Both Lambard and Crompton described the central government in a treatise upon the jurisdiction of courts. With Lambard's tract I have already dealt.[6] It is political rather than legal in its tone.

[1] Bk. iii c. 9 Epilogue. [2] Alston, Introd. xxvi.

[3] Ibid xxvi, xxvii—Similarly "the relations of church and state were too prominent a question in Smith's time, and convocation was still a body of too great constitutional importance, for them to be ignored . . . in an Elizabethan treatise on the constitution. Yet they are passed over without a mention."

[4] Ibid xxvii.

[5] Here I differ from Mr. Alston, who thinks that he devotes a large space to the Parliament only because "No account of the judicial system would be complete without it;" but we have seen that Parliament in Elizabeth's reign had come to be much more than a judicial court, above 183-184; Smith meant, as his letter to Haddon shows (cited Alston xiv) to raise the question, "whether what is held in England as law be the better, or what is held here (in France) and in those regions which are administered in accordance with Roman law;" by "law" Smith means rather public than private law, as the contents of his book show. Obviously the position of the English Parliament and its relation to the Prince afforded one of the greatest of contrasts to the public law of foreign states, above 167-168.

[6] Above 117-118; see also vol. v 166.

Crompton's treatise,[1] on the other hand, is legal rather than political—it owes much, as the author says, to the abridgments of Fitzherbert and Brooke.[2] It is to a large extent a digest of the Year Books and other cases applicable to the subject. I cannot but think that this characteristic of the literature of the subject is the most striking testimony to that continuity of development, which is the dominant and peculiar note of the history of English public law throughout this century of change.

Hooker's great work is the complement of Smith's. Smith describes institutions. Hooker attempts to extricate the political theory which underlay them. The "Ecclesiastical Polity," as its title implies, professes to be only a defence of Elizabeth's ecclesiastical settlement. But it is far more than this. It is in fact an explanation and a vindication of the Tudor polity in state and church. Because it is the only book which not only describes that polity but also explains its underlying principles, it is of immense historical interest; and because the results of the constitutional controversies of the seventeenth century were to give practical effect to the theory of the state outlined in it, it is of equal constitutional importance.[3]

Hooker's book is dominated by the mediæval idea of the supremacy of the law. Heaven and earth alike are governed by laws of different kinds—"the law which God with Himself hath eternally set down to follow in His own works; the law which He hath made for His creatures to keep, the law of natural and necessary agents; the law which angels in heaven obey; the law whereunto, by the light of reason, men find themselves bound in that they are men; the law which they make, by composition, for multitudes and politic societies of men to be guided by; the law which belongeth unto each nation; the law that concerneth the fellowship of all; and lastly the law which God Himself hath supernaturally revealed."[4] "Wherefore," he concludes, "of law there can be no less acknowledged, than that her seat is the bosom of God, her voice the harmony of the world, all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power."[5] All creation therefore, animate and inanimate,

[1] "L'authoritie et jurisdiction des courts de la Majestie de la roygne," published 1594; for his work on local government see above 116.

[2] See the dedication to "Mes Companions del Middle Temple." If it be true that the Diversitie des courts, vol. ii 524, was written by Fitzherbert, we could say that all the chief writers on local government (above 115-119) wrote also on other aspects of government, through the medium of books on the jurisdiction of courts; but there seems no sufficient ground for attributing this tract to Fitzherbert.

[3] The references have been taken from the third Ed. of the works of Hooker, edited by Keble; the Preface and the first four Books were probably published in 1594, the fifth book in 1597; the remaining three were not published till long after Hooker's death, Tanner, Constitutional Documents 171.

[4] Bk. i § 16, 1. [5] Ibid 8.

is governed by law. All men are governed by the overriding law of God and of reason; and, besides, they are governed by other laws of human origin.

In the first place men must obey the law of the particular society to which they belong—if this were not so, "we take away all possibility of sociable life in the world."[1] The contents of this law must differ according to the needs of particular societies, and must therefore vary with time and place.[2] Such laws will necessarily include rules both as to temporal and ecclesiastical matters; and all these rules must be obeyed, provided that they do not contravene the law of God or of nature.[3] Subject therefore to this condition, each particular state is free to adopt the mode of government both in church and state which it pleases.[4] Nor is this unreasonable, because the law really rests upon consent expressed or implied.[5] It is the act of the whole body politic; and this body politic includes both church and state.[6] Thus in England laws are made by the whole Parliament.[7] The king indeed has dominion over the whole state; "but with dependence upon that whole entire body, over the several parts whereof he hath dominion; so that it standeth for an axiom in this case that the king is *major singulis, universis minor*."[8] Though personally above the law of the state, he is personally subject to Divine law,[9] and his acts are subject to the law of the state.[10] So that, "though no manner of persons or

[1] Bk. i § 16, 5, "the public power of all societies is above every soul contained in the same societies. And the principal use of that power is to give laws unto all that are under it; which laws in such case we must obey, unless there be reason shewed which may necessarily enforce that the Law of Reason or of God doth enjoin the contrary. Because except our own private and but probable resolutions be by the law of public determinations overruled, we take away all possibility of sociable life in the world."

[2] Ibid § 10, 9, "To this appertain those known laws of making laws; as that law makers must have an eye to the place where, and to the men amongst whom; that one kind of laws cannot serve for all kinds of regiment."

[3] Bk. iii § 10, 7, "To make new articles of faith and doctrine no man thinketh it lawful; new laws of government what commonwealth or church is there which maketh not either at one time or another?"

[4] See ibid § 9, 2 and 3; ibid § 6, 6.

[5] Bk. i § 10, 8, "Laws they are not which public approbation hath not made so."

[6] Bk. viii § 1, 7, "With us one society is both church and commonwealth;" cf. ibid § 3, 6.

[7] Ibid § 6, 11, "The Parliament of England together with the convocation annexed thereunto, is that whereupon the very essence of all government within this kingdom doth depend; it is even the body of the whole realm;" and, these laws, "are not by any of us so taken and interpreted, as if they did receive their force from power which the prince doth communicate unto the parliament . . . but from power which the whole body of this realm being naturally possessed with, hath by free and deliberate assent derived unto him that ruleth over them. . . . So that our laws made concerning religion, do take originally their essence from the power of the whole realm and church of England."

[8] Ibid § 2, 7; this really expresses in the language of the political philosopher what Fineux C.J. in Y.B. 14 Hy. VIII. Mich. pl. 2 p. 3 (above 184 n. 3) tried to express in the technical language of the lawyer.

[9] Ibid § 9, 2 and 3.

[10] Ibid § 2, 17.

causes can be unsubject to the king's power, yet so is the power of the king over all and in all limited, that unto all his proceedings the law itself is a rule." [1] "What power the king hath, he hath it by law, the bounds and limits of it are known. . . . The whole body politic maketh laws, which laws give power unto the king." [2]

In the second place, these independent societies are bound together by the rules of international law. "The strength and virtue of that law is such, that no particular nation can lawfully prejudice the same by any their several laws and ordinances, more than a man, by his private resolutions, the law of the whole common wealth or state wherein he liveth." [3]

Europe, therefore, is no longer one body—one Holy Roman Empire. It is composed of a number of independent states, each of which is governed internally by its own municipal laws, and externally by international law; and over all is the law of God and nature.[4] It is law, therefore, which governs the universe; and those states in which the law is supreme are the best ruled, and most in accord with the Divine government of the universe.[5]

Hooker's book is the best proof that the Tudor sovereigns had succeeded in their efforts to adapt mediæval institutions and ideas to the needs of the modern state. It is because this adaptation had been gradually and peacefully effected that England in the sixteenth century produced no book of European importance upon the theory of the modern state. Grievances political or religious, acutely felt, are the force which inspire men to raise fundamental questions, and to write books which become landmarks in the science of politics. If it is true that a country is happy which has no history, it is equally true that it is happy in its form of government if its subjects are not moved to probe deeply into the theories which underlie that form of government. Mr. Gooch has said of Fortescue's books that "there is not much political philosophy to be found in them;" and that "the constant tendency of his work is to slide from general discussions into criticism of the constitution, or devising means for its amendment." [6] This is equally true of the political philosophy of Elizabeth's reign. The

[1] Bk. viii § 2, 13. [2] Ibid § 8, 9.

[3] Bk. i § 10, 12 and 13.

[4] Cf. Sir Thomas More's view, expressed in a letter to Cromwell, L. and P. vii no. 289, p. 124, that all Christendom is one "corps."

[5] Bk. viii § 2, 12, "Happier that people whose law is their king in the greatest things, than that whose king is himself their law. Where the king doth guide the state, and the law the king, that commonwealth is like a harp or melodious instrument, the strings whereof are tuned and handled all by one, following as laws the rules and canons of musical science."

[6] Democratic Ideas of the Seventeenth Century 32, 33.

existing constitution is taken for granted. There is no need therefore to discuss the fundamental principles underlying the modern state except in the most perfunctory way. Practical reforms of actual institutions are much more important.[1] It is mainly for this reason that continental speculation on the theory of the state had little practical influence upon England in the sixteenth century. But the minds of those who interested themselves in public affairs could not be wholly uninfluenced by it. It formed, so to speak, the intellectual background to the stage on which they played their parts, whether their political leanings led them to favour an increase in royal power or to advocate its limitation; and it will become important if a serious constitutional controversy arises within the state. We must therefore take some account of its existence and its as yet indirect influence upon English political theory. In the first place I shall glance at the influence of the royalist theories of the state, and in the second place at the influence of the theories of those who sought to place some limitation upon royal power.

(1) Seeing that the Reformation settlement was founded upon the royal supremacy, we necessarily find a strong leaning in favour of the divine right of the king.[2] We have seen that the Reformation, by emancipating the country from papal control, transferred to its ruler that divine right which was formerly the peculiar property of the pope;[3] and this necessarily led to assertions of the duty of blind obedience to the king, and of non-resistance to his will.[4] The Tudors were not indeed in a position to assert the divinity of hereditary right. This useful addition to the theory of the divine right of the king was not possible till the accession of James I.[5] But even in the Tudor period the theory of divine right strengthened the position of the king by giving a theological colour to the somewhat mystical legal doctrines concerning him and his prerogative; and both the legal and the theological doctrines were in harmony with the actual position of the king in the state. It is clear that they will be of infinite value to those who desire to magnify the royal power at the expense of all other

[1] Above 208 n 3.

[2] L. and P. xiv *i* no. 402 gives an official account of the Reformation compiled in 1539; at p. 154 it is said, "the clergy and realm have affirmed that the king is on earth immediately under Christ, supreme head of the church of England, and that the authority thereof is due to his crown, and likewise to all imperial princes in Christendom upon their churches if they will so accept it;" cf. Bekinsau, De supremo et absoluto regni imperio (Berthelet 1546) pp. 3, 3b, 19—"nihil in ullius regni ecclesia novum, absque principis auctoritate, legis instar sanciri potest;" the book was dedicated to Henry VIII.; cf. L. and P. vii no. 1384 for a note of another similar tract of the year 1534.

[3] Above 18, 19, 192, 196.

[4] Figgis, Divine Right of Kings 93-100, 104, gives some account of this literature.

[5] Ibid 100, 101; vol. vi c. 6.

powers in the state; and that, when Bodin's doctrine of sovereignty has been assimilated,[1] they will be able to be used to support a theory of royal absolutism.

(2) The Marian persecution had produced books which advocated resistance to the unlawful commands of rulers, similar in kind to the books produced in France during the wars of religion.[2] Similar ideas were preached by the Scotch reformers;[3] the United Provinces, definitely our allies during the latter part of Elizabeth's reign, were an object lesson of the advantages which might accrue from a successful resistance to tyranny;[4] and there was the large French literature, both Huguenot and Jesuit, which taught similar doctrines.[5] But these ideas had little influence upon Elizabethan England. The nation as a whole was content, and small grievances could be ventilated in Parliament. It was in the seventeenth century, when the supporters of the king had begun to formulate their absolutist claims, that we begin to hear of these ideas. The French literature of the wars of religion then began to influence English politics.[6] Having served its purpose in France it was destined to have a larger practical influence in England than it had had in its own country; and eventually, through the English political literature which it inspired, a yet greater influence upon the politics of Europe.

For the present the majority of the nation was satisfied with the balanced Tudor polity, which left large and undefined powers to the King and Council, to Parliament, and to the law. With the shape which the powers of King and Council and Parliament had assumed, and with the machinery of local government through which they worked, I have already dealt. We have seen that all these institutions had retained many mediæval characteristics, but that their form and their authority had been

[1] It may be noted that Crawley J. in the Case of Ship-money (1637) 3 S.T. at pp. 1083, 1084 cites Bodin to prove that, in cases of imminent danger, "the king ought not to expect a Parliament, but is to raise monies suddenly, and such impositions laid upon the subjects are just and necessary."

[2] Poynet's treatise on Politic Power, written by Poynet, bishop of Winchester, 1556; the work of Goodman, once Lady Margaret professor of Divinity, and the companion of Knox at Frankfort and Geneva; as Mr. Gooch says, Democratic Ideas in the Seventeenth Century 37, "Both works were inspired by the fact that Mary's religion was not theirs;" but that, "the principles introduced to defend the national religion are utilized to ensure the preservation of every department of national well-being."

[3] See Gooch, op. cit. 44-48 for the works of Knox and Buchanan.

[4] Ibid 52-54.

[5] Above 197-199.

[6] Gooch op. cit. 28, 29, "The political ideas to which the religious wars in France had given rise continued to circulate in England long after they were forgotten on the continent. The writings of the Huguenots were studied and quoted by the forerunners of the great democratic thinkers of the middle of the seventeenth century. . . . The pages of the Ultramontanes, again, were continually searched by Protestant controversialists, and by those eager to discredit the position of their Puritan opponents, by exhibiting their similarity to those that had been maintained by the hated Jesuits."

adapted to the needs of the modern state. We shall now see that this is generally true also of English law. At the end of the century the mediæval common law is still the basis of the English legal system. But it has been partially adapted to the new political conditions; and, in addition, other supplementary bodies of law have grown up by its side, and are in some cases threatening to overshadow it. In this way new ideas, some of which are derived from Roman law, civil or canon, have been received into the English system. There has been a Reception of new legal ideas during this century in England as well as in continental states. But, as we shall now see, this Reception of new ideas differed from the continental Reception of Roman law as fundamentally as the institutions of English state and the theories underlying it differed from contemporary continental institutions and theories. These peculiarities of the English Reception are the legal counterpart of the peculiar character which the changes wrought by the Reformation and the Renaissance had assumed in this country; and they are partly the effect and partly the cause of the differences between the English and continental institutions and political theories which I have just described.

III. The New Rules of Law—The Reception of Roman Law

The results of the Renaissance and the Reformation upon the political condition of Europe had been as extensive as their results upon its intellectual outlook and its religious state. Europe was no longer, even in theory, composed of a group of states or principalities which considered themselves to be members of one universal church and one universal state. It consisted of a number of independent territorial states. This change at once gives rise to the question, By what law are these states to be governed?

It is clear that old rules of customary law would not suffice, for they were both archaic in substance and cumbersome to administer. More civilized codes were needed both by the kings and statesmen who were creating a centralized administrative system, and by the private person whose demands upon the resources of the law grew more exacting with each advance in political, social, and economic development. In all the principal states of Western Europe, except England, this need was met by a Reception of Roman law. In some states, as we shall see, this Reception was no new thing in the sixteenth century. Ever since the legal Renaissance of the twelfth and thirteenth centuries, there had been states in which a gradual Reception had been

taking place;[1] and England and English law had for a short period come under these influences.[2] But whereas these influences had ceased to affect England at the end of the thirteenth century,[3] they had continued in a greater or a less degree to affect many of the continental states; and the intellectual, the religious, and the consequent political changes of the sixteenth century both added to their strength and extended the sphere over which they operated. It is for this reason that on the continent this century can fairly be said to be pre-eminently the century of the Reception of Roman law.

But in England there was no similar Reception. So far was England from receiving the Roman law that, at the end of the century, there were signs that the Reception which it might expect was a Reception of the common law. The common law was beginning to encroach upon and to question the jurisdiction of the new courts which had been established in this century:[4] it was beginning to impose upon them its own technical rules and conceptions. At the end of this century English law stood, as it stands to-day, in sharp contrast with the law observed in other countries in Europe, because it was and is the one system in which the technical language and the principles of Roman law are not recognized. This being the case, it may be asked, What bearing has this continental Reception upon English legal history? The answer is that it has an important bearing for two reasons.

In the first place, a study of the legal developments which were taking place on the continent helps us to understand the somewhat analogous developments which were taking place in England in the sixteenth century. England had its native common law. But in this century many new institutions and courts had been created or newly organized; and these institutions and courts acted upon principles which did not altogether harmonize with those of the common law. If these new institutions, new courts, and new principles had got the upper hand, there might well have been a sort of Reception in England. For, then as now, if a court administered a body of law which was not the common law, that body of law was pretty sure to be tinged more or less strongly with the principles of the civil law. Though these new institutions and new legal principles did not get the upper hand, the common law was in some respects modified by its contact with them; and it was obliged to contend for supremacy with the rival bodies of law which these new institutions were calling into

[1] Vol. ii 146, 270; below 249-250.
[2] Vol. ii 145-149, 176-178, 227-229, 267-286.
[3] Ibid 287-288.
[4] Vol. i 414-415, 459-463, 508-513, 553-554.

being. If we are to understand the new elements in our law, public and private, which were added to it in this century, if we are to understand the new political ideas which begin to emerge in this century and become all-important in the great constitutional controversies of the next, we must keep before our minds the contemporary legal history of the continent.

In the second place, the fact that one non-Roman system of law stood its ground in this age of the Reception is one of those events which have affected the legal history of a large part of the civilized world of to-day. It has directly affected the law observed in the British Dominions beyond the seas, and in the United States; and it has, in course of time, modified the effects of the Reception in Scotland. It has indirectly affected the constitutional history not only of those countries, but also of many countries in Europe; for we may well doubt whether the English constitution would have so developed as to be a pattern to many countries in the old and new world, if England had been the scene of a Reception such as took place in many continental countries.[1] Therefore the question why the English legal history of the sixteenth century presents this marked contrast to the legal history of other European nations raises a problem of first-rate inportance, which is essentially a problem in the history of English law. Its importance is as great as the problem why in the Middle Ages England alone among the nations of Europe developed a native common law. We shall see that, to a large extent, the solution of the mediæval problem is related to the solution of the sixteenth century problem as cause to effect. But to see how this relation of cause and effect was produced in this century of new ideas, new beliefs, and new institutions, a knowledge of what the continental Reception was, and what were its consequences, is clearly necessary. Without this knowledge we can appreciate neither the peculiarities of English law, which made it strong to resist foreign influences, nor the consequences of the native development of the law which was thus insured.

In dealing with the Reception I shall divide the subject as follows: Firstly, the development of Roman law on the continent and the contemporaneous development of English law; secondly, the development of Roman law in England; thirdly, the causes of the continental Reception, its extent, and the manner in which it was effected; fourthly, the extent to which the development of English law was influenced by the Reception; fifthly, the consequences of the Reception on the continent and in England.

[1] Maitland, English Law and Renaissance, 30.

The Development of Roman Law on the Continent and the Contemporaneous Development of English Law

While the English lawyers of the fourteenth and fifteenth centuries were developing the principles of the common law by means of arguments used in actual cases reported in the Year Books, their brethren on the continent were developing the principles of the civil law by means of glosses and commentaries and treatises upon the text of Justinian's books. And thus, while the English lawyers of these two centuries made the common law a system of case law, the continental lawyers of the same period made their law depend upon the common opinion of the legal profession,[1] to be gathered principally from legal treatises, and sometimes from the *Arrêts de règlement*, that is, the general rulings of the superior courts.[2] At the present day these two modes by which the legal profession can develop the law are the distinguishing marks of the countries of the common law and the countries of the civil law.

But it was only gradually that this and other differences between the English and the continental modes of legal development became distinct and stereotyped. The finished result is the product of many gradual changes. In England the age of Bracton and the age of Edward I. differ from the age of the Year Books; and the age of the Year Books differs from the age of the modern reports.[3] Abroad the age of the glossators differs from the age of the post-glossators or commentators; and the age of the commentators differs from the age of the jurists of the Renaissance. Both in England and abroad we can see the influence of these different ages upon the law of the present day. I must therefore say a few words about them if we would understand the form of the Roman law which the sixteenth century received.

The first period—the age of the glossators—covers the twelfth and thirteenth centuries. It is the age of Irnerius, Azo, the four

[1] Brissaud, Histoire du droit français 214, "Pour le praticien, ce qui importe, c'est moins une théorie élégante que la *communis opinio;* les citations et les autorités remplacent volontiers les raisons."

[2] "Les *Arrêts de règlement* des Cours souveraines étaient des décisions prises par ces Cours pour être observées comme lois dans l'étendue de leur ressort," Brissaud, op. cit. 375; Pasquier, Lettres Bk. xix no. 15, after explaining that arrêts given in individual cases do not form precedents (see below 224 n. 6), says, "Bien sçay-je, que sur tous les autres il faut porter un respect singulier aux *Arrests* qui sont és sur les veilles des festes solemnelles prononcez en robbe rouge, comme estans de propos delibré tirez pour servir de leçon à l'avenir aux Advocats en pareils subjects; non toutesfois par tous les Parlemens, mais en ceux auxquels ils ont esté jugez."

[3] Though we group together the reports from the sixteenth century onwards, and call them the modern reports, we must not forget (1) that there have been changes in their form, see vol. v 369-374; and (2) that in the last century, owing to the activity of the legislature, the power of the court to develop law on a grand scale by their means has been diminishing, see Dicey, Law and Opinion 487, 488.

doctors, and Accursius, whose great gloss summed up most of the work of his predecessors.[1] The work of this school took many different forms.[2] The most characteristic of these forms, and that which has given the school its name, was the gloss. These glosses were commentaries upon the text of Justinian's books—at first interlinear and then marginal; and they were of several distinct kinds—grammatical, critical, analytical, or in the form of a running commentary. Their length increased to such an extent that the text was almost buried beneath them. In the sixteenth century their authority was almost equal to that of the text[3]—"quidquid non agnoscit glossa, id non agnoscit curia."[4]

The defects of this school were due to the uncritical character of the period. The text of Justinian was both the Aristotle and the Bible of the lawyers.[5] They were ignorant of history,[6] philology, and literature;[7] and they treated Justinian's laws as a code which bound them as fully and as literally as the nations over whom Justinian had ruled. They knew no Greek.[8] But in spite of these defects their services were great. They restored to Europe the texts of the law from the actual sources. They explained these texts, and partially adapted them to the needs of their age;[9] and thus they laid the foundations of the system of modern Roman law—the system which is at the base of most of the legal systems of modern Europe. Their work, too, was eminently practical; for it not only brought the law into conformity with the needs of the day, it provided also apt formulæ for giving effect to the new needs of a changing society.[10] As we have seen, their work was analogous to that done in England by Bracton and his contemporaries.[11] But whereas they constructed their law by their work on the text of the Corpus Juris, the English lawyers constructed their law from the cases decided in the King's court. Thus, even in this early period, we have arrived at the fundamental difference between the

[1] Vol. ii 136-137, 227-228, 267 n. 6.

[2] Vinogradoff, Roman Law in Mediæval Europe, 47, 48; Tardif, Histoire des sources du droit français, Origines romains, 343-350; Brissaud, op. cit. 208, for the Summa, Casus, Brocarda, Quæstiones, Distinctions, and other forms.

[3] Tardif, op. cit. 343.

[4] This maxim, as we shall see below 243 n. 3, was not formulated in this form till the sixteenth century, but it substantially represented the facts.

[5] Brissaud, op. cit. 210.

[6] Thus they asserted that Justinian's constitutions were not dated by reference to the beginning of the "Christian era because he was reigning at the birth of Christ," Tardif, op. cit. 347.

[7] They derive the Lex Falcidia from "Falx" because it cuts legacies as a sickle cuts corn.

[8] "Græcum est, non legitur," Brissaud, op. cit. 211.

[9] Flach, Cujas, Les Glossateurs, et Les Bartolistes, 19.

[10] Ibid 20, "La Glosse offrait aux professeurs et aux légistes des expressions appropriées aux besoins nouveaux, des formules toutes faites, d'un emploi commode;" Esmein, Histoire du droit français, 838-841.

[11] Vol. ii 270.

English and the continental methods of developing a legal system.[1] But both in England and on the continent it was not till the following period that these modes of development attained their permanent form.

The second period—the age of the commentators or post-glossators—covers the fourteenth and fifteenth centuries. The precursors of this school came from France. Jacques de Revigny, who died in 1296, is said to have been its earliest representative.[2] Its most famous exponent, from whom the school took its name, was the Italian Bartolus de Sasso-ferrato (1314-1357).[3] He and his famous pupil Baldus de Ubaldis (1327-1406)[4] are to this school somewhat what Accursius was to the school of the glossators. Their work consisted in the construction of a positive body of legal doctrine from the text and the gloss. Departing from the methods of their predecessors, they used for their work of construction the prevailing method of reasoning—the scholastic dialectic; and their works have all the consequent defects.[5] "Verbosi in re facili, in difficili muti, in angusta diffusi."[6] They were in the habit of citing enormous lists of authorities for and against a proposition which they seemed to count rather than to weigh.[7] Their style was barbarous. Like the glossators they had neither history nor literature;[8] and, like their contemporaries the scholastic philosophers, they often discussed with much gravity and in solemn form the most academic questions—a well-known instance is the discussion whether the will of Lazarus was valid after he was raised from the dead.[9] And this tendency has always been a note of the civil law mainly, as we shall see, because they did not attach

[1] Vol. ii 243-244.

[2] Brissaud, op. cit. 215; Esmein, op. cit. 841, 842.

[3] For an account of Bartolus see Woolf, Bartolus of Sasso-Ferrato; the events of his life are summarized by Woolf, op. cit. 1-4, and App. A; Figgis, Bartolus and the Development of European Political Ideas, R.H.S. Tr. (N.S.) xix 147 seqq.; Brissaud, op. cit. 216, 217; Savigny, History of Roman Law in the Middle Ages (French Tr.), iv chap. liii.

[4] Brissaud, op. cit. 217; Savigny, op. cit. iv chap. lv.

[5] Brissaud, op. cit. 214.

[6] Cujas, Resp. Pap. liv. 5, *ad leg.* 17, *De iniusto*, cited Brissaud, op. cit. 214 n. 3.

[7] Hotman, Anti-Tritonian (Ed. 1681) 92, tells us that the jurist Tiraqueau, the friend of Rabelais (E.H.R. xv 473), having on one occasion cited 120 authorities, said that he would now cite as many or more who held the contrary opinion; Hotman adds, "De ces involutions espineuses dont l'on use coustumiérement és conseils et escritures doctorales, est advenu que les pauvres juges qui s'y veulent amuser . . . sont contraints de confesser qu'ils ont les yeux éblouis et jugent plustost par hasard que par cognoissance de droit certain et asseuré;" cp. Rabelais, Pantagruel, Bk. iii chaps. xxxix-xliii, for the account of the trial of Judge Bridlegoose who decided causes in law by the chance and fortune of the dice.

[8] This is forcibly expressed by Rabelais, Pantagruel, Bk. ii chap. 10, "Ces vieux mastins ignorans de tout ce qu'est necessaire à l'intelligence des lois"—for the whole passage see Maitland, English Law and the Renaissance, 39, 40.

[9] Melanchthon, Censura de Legibus (Speigellii Lexicon, col. 299), "Nihilo saniores iurisconsulti fuere qui disputarunt de Lazaro, valueritne testamentum posteaquam revixit, et hoc genus innumerum."

the weight which the common lawyers were more and more coming to attach to the actual cases decided in the courts.[1] But, in spite of all their defects, their influence has been far greater than that of the earlier school. In the first place, they were far more than merely commentators upon the texts of the civil and canon law which they took as their starting-point. Their work was more synthetic and more original than that of the earlier school; for they systematically used their texts in order to create new rules of law suited to the needs of their age.[2] In the second place, they were far more than mere lawyers. In the Middle Ages law did not occupy a sphere so separate from the spheres of politics and morals as it occupies in modern times.[3] Both political and moral questions were looked at from a legal point of view, with the result that the sphere of law was widened, and the law itself humanized.[4] Thus we can find in their writings not only rules of law, but also many political theories. Both the rules and the theories often stray very far from anything that can be fairly deduced from the texts—they are, as M. Brissaud has said, to the texts what our modern languages are to classical Latin.[5] This characteristic goes far to account for the extent of the Reception of the sixteenth century ; and, as we shall see, it has given to their works a large influence not only upon the law, but also upon the politics of the future.

This period has something in common with the contemporary period in the history of English law—the period of the Year Books. In both cases the main external characteristics then acquired by the law have been very permanent, because in both cases they have hardened into rules of practice and modes of legal reasoning; and these things, when they have become the traditional property of a legal profession, are the least susceptible of change. In both

[1] J. C. Gray, The Nature and Sources of the Law, p. 261, "There is unquestionably one evil caused by the habit of considering imaginary cases rather than real ones—a tendency to develop distinctions purely theoretical, and to complicate the law with principles and deductions which have no place in the conduct of life, and this tendency certainly shows itself in the Civil as compared with the Common Law. Think, for instance, of the discussions and doctrines on necessary and impossible conditions—on legacies if Titius goes to the moon, if Titius does not go to the moon, if Titius never dies, &c."

[2] Gravina, De Ortu et Progressu Iuris Civilis (Works, Ed. 1717, i 135), "Bartolini iurisconsulti, a veterum definitionum explicatione, ad nova ipsi se definienda vertebant, condendoque magis quam interpretando iuri civili vacabant. Ut non tam interpretes, quam . . . compares quodammodo veterum iuris auctorum evaserint;" cp. Woolf, op. cit. 4-5; at p. 9 he says, "at every page we are transplanted into the active, many-sided life of the Italian cities of the fourteenth century."

[3] See Woolf, op. cit. 12-15 for the exalted claims which Bartolus made for the "civilis sapientia," which he considered law to be.

[4] As Mr. Figgis says, R.H.S. Tr. (N.S.) xix 167, "When everything is seen under legal forms, the notion of law itself is wider and more universal than that of modern legalism. If you narrow theology and refrigerate ethics, you humanize law by the process."

[5] Op. cit. 213.

cases the law has a double aspect. In its rules are contained not only the civil and criminal law of the state, but also such constitutional and political theories as the state possesses. In both cases these theories become very important in the law of the future. The great contrast appears in the modes in which the law is developed—in the contrast between the continental mode of development through the writings and the common opinion of the lawyers, and the English mode of development through decided cases. We may, indeed, see a certain superficial similarity between the Year Book reports and the writings of the continental jurists. Our modern theory as to the binding force of decided cases was being evolved; but, owing to the forms of procedure and pleading then in use, it had not yet attained its final form.[1] The law was made rather by arguments and dicta used in cases real or hypothetical than by considered judgments.[2] This is not so very unlike the mode in which the continental lawyers at this period evolved their law—"we see in their books long columns of arguments for and against drawn up like two armies upon the point which is being considered."[3] This led to a prolixity of statement not unlike that which characterized the Year Book debates; and their method of scholastic dialectic with its divisions and distinctions, its rules and exceptions, its amplifications and additions, its declarations and repetitions,[4] was used by our English lawyers in arguing upon the many analogous cases which were suggested by the ingenuity of the bar or bench as the debate in court proceeded.[5] But really the resemblances are superficial and the difference is fundamental. The continental lawyers constructed their systems from a text and from the raw material of cases real and imaginary. Books upon the text, upon the cases, and upon other books upon the text and cases, contained the authoritative statements of legal doctrine—they were the *Responsa*, which had the force of law. The actual case before the court was merely a concrete application of this legal doctrine, which had no bearing upon the meaning or extent or existence of the doctrine.[6] The English lawyers, on the other hand,

[1] Vol. ii 541-542. [2] Ibid 554-556.

[3] Brissaud, op. cit. 214; above 222.

[4] Brissaud, op. cit. 214.

[5] Coke, speaking of Littleton, says, "He was learned also in that art, which is so necessary to a compleat lawyer, I mean of Logick, as you shall perceive by reading of these Institutes, wherein are observed his Syllogisms, Inductions, and other arguments; and his Definitions, Descriptions, Divisions, Etymologies, Derivations, Significations, and the like," Co. Litt. Pref.

[6] Vacarius laid it down that if the judge interprets law the interpretation only holds good for the case before the court, Vinogradoff, Roman Law in Mediæval Europe 56 and App. V; this tradition was constant, Pasquier, Lettres (Œuvres, ii 578), says, "*Nullum simile idem, atque adeo non exemplis sed legibus iudicatur.* Ce fut la cause pour laquelle nostre bon et sage Premier President de Tou, quand un advocat plaidant se prevaloit d'un Arrest donné en cas semblable au profit de quelqu'un, avoit accoustumé de dire, *Bon pour luy*, et commandoit que, sans arrester à

started *ab ovo* or nearly so. They constructed their system from the raw material supplied by the cases which came up for trial in the King's court. As there was no other means of developing legal doctrine than by attending to the rulings in these cases, these rulings necessarily came to be regarded as authoritative. That they were authoritative was quite clear at the end of the sixteenth century; and Coke explains that it is due to this fact that the common law is superior to the civil law in the certainty of its rules.[1]

That it is this absence of an authoritative text which is the real basis of the difference between the continental and the English modes of developing a legal system, appears the more probable from the fact that in those continental countries, where the law was not based so exclusively upon the text of and commentaries upon the civil law, a greater weight was given to the decisions of the courts. Considerable weight was given to them in France in the *pays des coutumes* in the days before these customs were codified,[2] and also in Holland, where the Roman was combined with the native law into the system of Roman Dutch Law.[3] At the present day, a greater weight is everywhere being attached to precedents, partly because the authority of the text of the civil law is diminishing, and partly because that text has little bearing upon the problems which the needs and activities of the modern state set to the law.[4]

The third period—the age of the Renaissance jurists—covers the sixteenth century. The French Budé, who died in 1540, the Italian Alciat (1492-1552), the German Zasius, who died in 1535, were the earliest leaders of the new school.[5] France was its chief

cela, l'advocat deffendist sa cause pour bons et valables raisons;" Duck, De usu et auctoritate iuris civilis Bk. i c. 8, and the concluding sections; cp. Gray, The Nature and Sources of Law pp. 194-199.

[1] Second Instit. Pref., "Upon the text of the Civil Law, there be so many glosses and interpretations, and again upon those so many Commentaries, and all these written by Doctors of equal degree and authority, and therein so many diversities of opinions, as they do rather increase than resolve doubts and uncertainties, and the professors of that noble science say, that it is like a sea full of waves. . . . Our Expositions . . . are the resolutions of Judges in Courts of Justice in judicial courses of proceeding, either related or reported in our books, or extant in judicial records or in both, and therefore, being collected together, shall (as we conceive) produce certainty. . . . For *Iudicia sunt tanquam iuris dicta*;" it appears, too, from Co. Litt. 254, and Fourth Instit. 318, that the distinction between authoritative reports and the dicta of text writers and others is quite clear; cp. Doctor and Student ii c. 4; the authority of the Reports is implied in the petition of the Students in 1547 against the encroachments of the Chancery, Dasent ii 48, 49.

[2] Esmein, op. cit. 810, "Les sentences et arrêts sont la meilleure et la seule expression vraiment authentique d'une coutume non écrite."

[3] J. W. Wessels, History of the Roman Dutch Law 236-238.

[4] Dicey, Law and Opinion, 485, 486; L.Q.R. xxvi 277, 278; Salmond, Jurisprudence 160; on the whole subject, cp. Gray, The Nature and Sources of the Law pp. 193-199.

[5] For these see Maitland, English Law and the Renaissance 38, 39; for Budé see E.H.R. xv 456-458.

home, as Arthur Duck [1] testified; and the University of Bourges [2] was its chief centre. Its most famous representative was Cujas [3] (1522-1590). Almost equally eminent were such men as Hotman, Doneau, Douaren, Baudouin, and Jacques Godefroy.[4] All these jurists in various ways applied the new learning to the study of the civil law. With the aid of classical history and classical literature, they attempted to restore to Europe the real meaning of the texts; and they expressed their results, not in the crabbed style of the Bartolist, but in the polished language of the humanist scholar. Their work was partly exegetical like that of the old glossators,[5] partly synthetical. They are the real ancestors of the modern school of Roman lawyers,[6] who, by reason of the supersession of Justinian's law by national codes, have been set free to analyse and to decompose into their elements the rules and theories contained in the texts in which the law has come down to us.[7]

As in other branches of learning, the conflict between the old school and the new was acute. Hotman tells us that in the universities there were two factions amongst the lawyers—the old school who were nicknamed scribblers, Bartolists, and barbarians, and the new school who were nicknamed humanists, purists, and grammarians.[8] This undoubtedly hit off the defect of the new school from the point of view of the practitioner who cared very little for points of textual criticism, or for the classical law taught

[1] Bk. ii c. 5 § 1, "Iurisprudentia Romana si apud alias gentes extincta esset, apud solos Gallos reperiri posset."

[2] Pantagruel (Bk. ii c. 5) goes to Bourges, "où il estudia bien longtemps et profita beaucoup en la Faculté des loix," cited Esmein, op. cit. 844 n. 2.

[3] For his life see Brissaud, op. cit. 350-357; Duck, Bk. ii c. 5 § 39, says, "Tot encomia Galli merito tribuunt, ut appellent eum iuris consultorum sui et retro saeculorum principem, a quo nativam iuris lucem scientiae ea aetas habuit et postera debitura est, Tholosae suae et orbis decus, et quod nulla aetas iuris consultum doctiorem, acutiorem, aut iudicii sincerioris vidit aut videbit."

[4] Brissaud, op. cit. 350, 353 n. 1; Esmein, op. cit. 844-845; Maitland, English Law and the Renaissance 40.

[5] See this point clearly explained by Flach, Cujas, Les Glossateurs et les Bartolistes 15 seqq.

[6] Girard, L'Enseignement du Droit Romain en 1912, 9.

[7] "Our interest in the *Corpus Juris* consists in recovering from the harmonizing text of the compilers dogmatic differences between every age and every jurist, in underlining those discrepancies of thought, expression, and decision, which, so long as the *Corpus Juris* was considered simply as a code, it was our object to suppress and explain away," De Zulueta, The Study of Roman Law To-day 7.

[8] Anti-Tribonian 98, "En nos Universitez de maintenant il se voie deux sortes et comme partialitez de Legistes: dont les uns sont nommez chaffourreurs, Bartholistes, et barbares; les autres humanistes, purifiez, et grammairiens;" cp. Pantagruel, Bk. ii c. 5 (Urquhart and Motteux's Tr.), "He (Pantagruel) would sometimes say that the books of the civil law were like unto a wonderfully precious, royal, and triumphant robe of cloth of gold edged with dirt; for in the world are no goodlier books to be seen, more ornate nor more eloquent, than the texts of the Pandects, but the bordering of them, that is to say the gloss of Accursius, is so scurvy, vile, base, and unsavoury, that it is nothing but filthiness and villainy."

by Papinian or Paul, but very much for the law which courts were actually administering. As Gravina said, the leaders of this school were but the ministers of the ancient jurisprudence, and shed little light upon actual cases which were argued in the courts.[1] Moreover, like our modern civilians, they did not spare the work of Justinian and Tribonian;[2] and, as Heineccius complained in the eighteenth century, their carping criticism was calculated to destroy the whole system of Roman law without putting any workable alternative in its place.[3] Some of these criticisms are perhaps exaggerated. The work of the new school was not wholly confined to criticisms of the text and to reconstitutions of ancient history. Some of the jurists, notably Doneau, abandoned the exegetical method for the synthetic.[4] The new learning was made to correct the errors, historical, grammatical, and critical, of the older schools, and to bring legal learning up to the new standards which were being established in other branches of knowledge.[5] "Sine historia caecam esse iurisprudentiam," said Baudouin; and even a limited application of this maxim, which, as M. Brissaud says,[6] may be taken as the motto of the new school, was sufficient to expose the grosser errors of the older lawyers. The younger generation of lawyers had at least an opportunity of avoiding them. Gravina recommends the student to begin his study by learning the original and unadulterated principles of Roman law from the authors of the new school. He should then, he says, turn to the works of Accursius; and finally take up the works of Bartolus, from which he will learn the actual practice of the law.[7] It is clear, therefore, that the

[1] Gravina, op. cit. i 136, "Huius autem Scholae primores, ministri tantum sunt Iurisprudentiae veteris: nova enim et forensia negotia vix attingunt."

[2] Hotman had many hard things to say of them in his Anti-Tribonian, see e.g. p. 21, "Un amas rassemblé de tant de petites pièces et lopins . . . que on n'en peut entendre le tiers, encores avec la préalable cognoissance des historiens Grecs et Latins;" and p. 75, "Des propos rompus, inutiles et recueillis par cy et par la . . . sans aucune liaison et fil continuel de dispute."

[3] Historia Iuris civilis ac Germani (Ed. 1740), 412, 413—the scholars do nothing for doctrine, but, "Figerent refigerentque, omniaque Romanorum instituta petulantissime riderent, Iustinianum omnemque eius laborem ludibrio exponerent, merasque antinomias, Tribonianismos et nescio quae alia monstra vel larvas potius venarentur, quin et novum ius, si fieri posset, conderent, nihilque suo loco stare permitterent;" cp. Hallam, Lit. Hist. (Ed. 1872) ii 170, 172.

[4] Flach, op. cit. 24, 25; Esmein, op. cit. 844 n. 5.

[5] See Flach, op. cit. 25, for the influence of Doneau's work in Germany.

[6] Op. cit. 349.

[7] Op. cit. 136, "Qua propter sua studia recte instituturus primordia et elementa iuris e Cujaciana Schola petat: ut nihil initio imbibat nisi sincerum, et incorruptum, ac vere Romanum: quae cum in sanguine verterit, certis et obscurioribus in locis ad intelligendi facilitatem Accursium adhibere. Quo in labore, cum se probe exercuerit, expenderitque vires suas, Bartolinis utatur interpretibus: ut ad patrocinia causarum, scientia munitus accedat, et usu. Ex hoc enim studio ei facile ad subortas quaestiones, et quotidiana negocia, rationes, et auctoritates, exemplaque abunde offerentur."

Bartolist tradition still survived in the courts because it had determined the rules of practice and the modes of legal thought and reasoning.[1] It is not till these last days that the cessation of the practical use of Roman law has allowed Roman law to be studied wholly on lines which these Renaissance jurists would have approved. And, with the necessary survival of the Bartolist tradition, there doubtless still survived some traces of the old ignorance and barbarism.[2] But the law was gradually given a form and expression more suited to the new age; and this in the long run could not help influencing the rules of law actually applied in the courts. Moreover, what the new school did for the rules of law it did also for legal and political speculation. If the legal and political speculations of the sixteenth century owe many of their ideas to the school of Bartolus, they owe their literary form and their apt use of classical instances to the literary and critical spirit of the Renaissance.

The Development of Roman Law in England

English law in the sixteenth century was not unaffected by this revival of Roman law. The same needs, which, as we shall see, caused Roman law to be received in Western Europe, operated in England. In England, as abroad, it was necessary to increase the power of the state in order to enable it to deal with the new problems set to it in this age of new beginnings, in which the state had become supreme. In England, as in the other Protestant states of Europe, the Reformation seriously affected the position of the canon law. But in England the change in the position of the canon law was more sudden and more drastic than in any other country. Its teaching was summarily stopped;[3] and the immediate effect of this elimination of the canon law was not, as in other countries, to promote the study of the civil law, but to depress it. But to understand the reason for this we must explain briefly the position of the civil and canon law in mediæval England.

From the end of the twelfth century the civil and canon law had been taught at Oxford, and, from a somewhat later date, at

[1] Esmein, op. cit. 845, points out that, though the scientific influence of the new school on the world, and especially on Germany, was immense, its influence on the interpretation of Roman law as applied in the courts was less considerable; the practitioners "restèrent en grande partie fidèles aux doctrines qu'ils tenaient de l'École bartoliste;" in Spain and Portugal the works of Bartolus had almost the same authority as the text, Duck, Bk. ii c. 6 § 29; J. W. Wessels, Hist. of Roman Dutch Law 118; it was the same in Germany, Schröder, Lehrbuch der Deutschen Rechtsgeschichte 809; Flach, op. cit. 23-25.

[2] Heineccius, op. cit. 412, "At tantum abest ut hi (the new school) debellarint barbariem, ut ea multis post annis in foro et scholis regnavit, et quibusdam locis et hodie regnet, imperet, triumphet;" Heineccius died in 1741.

[3] Vol. I 592.

Cambridge.[1] The two universities, therefore, had acquired the monopoly of teaching and conferring degrees in these two bodies of law, as the Inns of Court had acquired the monopoly of teaching and conferring degrees in the common law.[2] Although there were large differences between the degrees conferred and the modes of instruction adopted by these different teaching bodies, there were also broad similarities.

I have already said something of the process by which the inner barristers or students became utter barristers. We have seen that the utter barristers still continued to teach, and that from them were chosen the readers and benchers, who were mainly responsible for the maintenance of the educational system of the Inns.[3] In fact all the members of the Inns were either learners or teachers till they took the degree of Serjeant at law, and left their Inns of Court to become members of the Serjeants' Inns, and often in due course judges.[4] The course pursued by the civilian and the canonist was necessarily different. At Oxford[5] the candidate for the first degree in the canon law—the degree of Bachelor of Decrees—must have studied the civil law for five years, and have heard lectures on the Decretals twice, and on the Decretum for two years. The candidate for the higher degree of Doctor in this faculty must have read *extraordinarie* two or three "causes" on some one of certain selected parts of the Decretum; and he must have opposed and responded to the questions of every Regent, and have given one lecture for each Regent. After obtaining the degree he must have acted as Regent—i.e. he must have taken part in teaching—for two years. The candidate for the first degree in the civil law—the degree of Bachelor of Civil Law—must, if a Master of Arts, have studied for four years, and if not, for six years. The candidate for the degree of Doctor of Civil Law must have lectured on the Institutes, the *Digestum Novum*, and the *Infortiatum*;[6] he must have given an ordinary lecture for each regent doctor, and he must have opposed and responded in the school of each Decretist. It would appear that the course of study pursued at Cambridge was substantially similar.[7]

[1] Rashdall, Universities ii Pt. II. 338 n. 2; ibid 543-553.
[2] Vol. ii 496-498. [3] Ibid 504, 506-507. [4] Ibid 485-493.
[5] Rashdall, Universities ii Pt. II. 453, 454.
[6] See vol. ii 136 n. 10, 139-141 for the mediæval divisions of the Corpus Juris Civilis, and Canonici.
[7] Mullinger, History of the University of Cambridge i 364—the candidate for the Doctor's degree in civil law must, if a regent in arts, have heard lectures on the civil law for eight years, and, if not, for ten years; he must have heard the Digestum Vetus once, the Digestum Novum and Infortiatum twice; he must have lectured on the Infortiatum and the Institutes; he must be the possessor of two Digests, and have in his possession all the text-books of the course; for the doctor's degree in

I have already described the moots, and the readings by means of which the legal education of the common lawyer was carried on;[1] and for the insular common law, which depended primarily upon the ever-developing custom of the king's courts, the unique modes of instruction devised by the Inns of Court were best suited. At Oxford and Cambridge, on the other hand, the civil and canon law were taught on much the same system as they were taught all over Europe. The student had at his disposal the texts of the civil and canon law, and the glosses and commentaries of the ablest lawyers in Europe;[2] and if he wished to get the latest glosses and commentaries at first hand he could go to Italy and learn from the lectures of the most famous lawyers in Europe—from men like Accursius, Bartolus, Baldus, Gerson, and many others, who were to the civilian and canonist what Glanvil, Bracton, Britton, and Littleton were to the common lawyer.[3]

But in spite of these fundamental differences, there are certain broad analogies between the degrees obtained by the student of one or other of the Roman systems, and those obtained by students of the common law; and between the modes in which they were educated. The call to the bar and the degree of Serjeant corresponded roughly to the degrees of bachelor and doctor; and just as the candidate for the doctor's degree must have taught as well as learned, so the Serjeants were created from the senior members of the Inns, who, as benchers and readers, took part in their educational work. Similarly the disputations in the Schools were not wholly unlike the moots which formed so important a part of the discipline of the Inns.

It is clear that the existence of the legal university of the Inns of Court, and the existence of the common law, materially affected the position of the student of the canon and civil law. His learning had, from the end of thirteenth century, been banished from the courts of common law.[4] It was useful in the Chancery, the Council,[5] and the court of the Admiralty;[6] and, though much of the larger litigation in ecclesiastical cases went to Rome, there was a wide field for the activity of the canonist in the

canon law the candidate must have heard lectures on the civil law for three years, and on the Decretals for a further three years; he must have lectured on one of four treatises, and on some one book of the Decretals.

[1] Vol. ii 506-507. [2] Ibid 136-137, 140; above 220-223.

[3] See vol. ii 140 n. 5 for the Glossae Ordinariae on the various parts of the canon law.

[4] Ibid 287-288.

[5] Vol. i 417, 481; below 273-274; see Baldwin, The King's Council 81-82, 134, 142, 368.

[6] Vol. i 546; below 238, 272; L.Q.R. xxxv 80-82, 295, 298. As early as 1430 it would seem that there was a body of advocates practising before the Courts of Admiralty in London, Senior, Doctors' Commons and the old Court of Admiralty 32.

numerous ecclesiastical courts with their extensive jurisdiction.[1] The civilians and canonists abroad could boast with truth that the practical quality of their knowledge enabled them to take a larger and a more direct share in the government of the state than mere philosophical theorizers.[2] They could make the same boast in England; but in England they were forced to admit that their dominion over practical affairs was shared by the students of the common law.

On the other hand, the theologians, philosophers, and the men of letters, then as now, regarded the study of the law as a pursuit which was followed mainly because it led to place and preferment;[3] and, as the study of the civil law was closely united with that of the canon law, it was made a cause of complaint that the study of both these laws unworthily confused things human and divine, and the calling of the layman with that of the cleric.[4] Probably this particular complaint was especially well justified in England. To practise in the ecclesiastical courts one must be a canonist; and if a man was in the king's service it was clearly advantageous to be in orders, because the resources of the church were freely used to reward those who had done good work in the Chancery or elsewhere.[5] We have seen that a knowledge of the civil law was

[1] Vol. i 598-632. Mr. Senior points out, Doctors' Commons and the old Court of Admiralty 33, that as early as Edward III.'s reign we see the king relying on the judges of the ecclesiastical courts for advice on the law of the sea; as he says, this is prophetic of the future partnership of Probate, Divorce, and Admiralty jurisdiction in one Division of the High Court.

[2] Songe du Vergier Ek. 1 *ad fin.*, cited Nys, Orgines du droit International 96-97; it is there said that the principal study of a king should be to govern his people by the counsel of the wise, "Par lesquels je entens principalement les juristes, c'est assavoir qui sont expers en droit canon et en droit civil et és coutumes et constitutions et loix royaulx. Par le conseil desquels doit estre le peüple gouverné, et non par les arciens (philosophers), jacoit ce qu'ils aient les principes du gouvernement du peuple, c'est assavoir és livres de ethiques, economiques, et politiques. Mais ils ont ceste science en général et ils n'en ont pas la pratique; ni aussi ne le sauroient mettre a effet. . . . Les termes et les metes des philosophes sont de bailler les principes du gouvernement du peuple sans en avoir le pratique ne l'exercise, mais les juristes si en ont la pratique et l'exercise."

[3] Bury, Philobiblion chap. xi says of the study of the law that, "That lucrative practice of positive law, designed for the dispensation of earthly things, the more useful it is found by the children of this world, so much the less does it aid the children of light in comprehending the mysteries of holy writ, and the secret sacraments of the faith, seeing that it disposes us peculiarly to the friendship of the world, by which man, as S. James testifies, is made the enemy of God;" Mullinger, op. cit. i 209-212, citing Bacon, Compendium Philosophiæ c. 4; for the fifteenth century see the comments of Poggio Bracciolini cited ibid 319 n. 2.

[4] "And not only does the civil law of Italy destroy the pursuit of learning in that it carries off the resources of students and diverts fit persons (from that pursuit), but also in that by its associations it unworthily confounds the clergy with the laity," Bacon, Compendium Philosophiæ c. 4, cited Mullinger, op. cit. i 210.

[5] Vol. i 587; vol. ii 233; thus in 1339 Edward III. commissioned three clerici to advise as to the settlement of piracy claims; the three were Adam Murimouth Official of the court of Canterbury, Richard de Cheddesleye Dean of the Arches, and Henry de Iddlesworth canon of St. Paul's, Select Pleas of the Admiralty (S.S.)

required for the degrees in the canon law;[1] and a comparison of the numbers who took the degree of Bachelor in that faculty with the numbers who took the corresponding degree in the civil law, in the latter part of the fifteenth century,[2] show that the students of that age were well aware of the superior practical advantages of a degree in the canon law. As the civilians equally with the canonists were excluded from the courts of common law, there was no scope for the growth of an independent body of civilians; and thus the civil law was studied, not so much for itself, as because it was a useful supplement to the knowledge of men who hoped to win honour and wealth by gaining posts, most of which could only be held by clerics and canonists.

The Reformation in England, as in other Protestant states, led to the active discouragement of the study of the canon law; and, in consequence of that discouragement, it ceased to be taught and degrees ceased to be taken in it.[3] But, seeing that in England the existence of the non-Roman common law had, in the largest number of cases, caused the civil law to be studied in combination with, and with a view to a degree in, the canon law, the sudden change in the position of the canon law naturally reacted on the study of the civil law. Henry VIII. foresaw this result of his measures; and he attempted to obviate it by establishing lectures on the civil law at both universities.[4] At Cambridge the versatile Sir Thomas Smith[5] did his best to prepare himself to teach his new subject by a course of study at Padua and at the French universities;[6] and, on his return, he set forth in two famous inaugural lectures the mode in which he proposed to teach his subject, and the advantages to be derived from its study.[7] At Oxford the first lecturer was John Story, the future chancellor of Bishop Bonner —less famous for his juristic studies than for his two imprisonments by the House of Commons, his seizure in Belgium by the emissaries of Elizabeth, his death as a traitor, and his beatification by the Roman Church.[8] But neither the professor who rose to be

[1] Above 229.

[2] Mullinger, op. cit. i 320 n.—for the years 1459-1499 there were 143 bachelors of canon law as against 38 bachelors of civil law; probably the chief scope of the civilian's practice would be in the Admiralty—in 1444 we meet a B.C.L. acting as commissary to the Lord High Admiral, Black Book of the Admiralty (R.S.) i 258.

[3] Vol. i 592; above 228; Stubbs, Lectures in Mediæval and Modern History 368; one Browne of Balliol applied in 1715 for leave to proceed as bachelor and doctor of the canon law; he was told that "he could not be prevented from doing so if he wished it, but that it would give the University a great deal of trouble;" "the poor man," Stubbs tells us, "died before he achieved the object of his ambition," ibid 381.

[4] Vol. i 592.

[5] Above 209-210.

[6] Mullinger, op. cit. ii 57, 58.

[7] Ibid 129-132; cf. Maitland, English Law and the Renaissance 49-51.

[8] Dict. Nat. Biog.; Dasent ii 229 (1548) records a warrant to the treasurer to pay J. Story the lecturer of civil law at Oxford his salary and arrears.

Secretary of State and gained lasting fame as the writer of a classic treatise on the commonwealth of England, nor the professor who illustrated in his own person a leading principle in the law of allegiance,[1] succeeded in attracting many students to their lectures. Both at Oxford and Cambridge contemporary testimony is clear that the study was almost extinct.[2] But this was a matter of serious concern to the government. The state might get on well enough without a body of canon law. The condition of the ecclesiastical courts, and of the law which they administered in Edward VI.'s reign, show that the state did not concern itself to prevent their decline.[3] But, in this age of competing states and growing foreign trade, it was not possible to dispense with the services of men who could deal with the diplomatic questions, and with those points of maritime and commercial law which were constantly creating international difficulties. To argue these questions effectively a knowledge of the civil law was essential; and therefore the government found itself obliged to take action to save a branch of learning, the knowledge of which was essential to the proper equipment of a modern state. "We are sure," wrote the Protector Somerset to Ridley,[4] "you are not ignorant how necessary a study that study of civil law is to all treaties with foreign princes and strangers, and how few there be at present to do the King's Majesty service therein. . . . Marry, necessity compelleth us also to maintain the science." At the beginning of the following century both James I.[5] and Bacon[6] insisted on its necessity for substantially the same reason.

In 1547 two commissions were appointed to enquire into the

[1] He attempted to plead that he had ceased to be an English subject and that he was not therefore amenable to the English law of treason; for the law on this point see Pt. II. c. 6 § 3.

[2] Ayliffe, Ancient and Present State of the University of Oxford i 188 (1547), says, "the Books of civil and canon law were set aside to be devoured by worms as savouring too much of popery;" Wood-Gutch, History and Antiquities of the University of Oxford 79, says, "the civil and canon laws were almost extinct, and few or none there were that took degrees in them, occasioned merely by the decay of the church and the power of bishops;" for Cambridge see the statement in the commission of 1547, cited Cooper, Annals ii 16 n. 1; Mullinger, op. cit. ii 132—at Cambridge between 1544 and 1551 only one person graduated as doctor, and only eight as bachelors of law.

[3] Vol. i 593; cf. vol. iii 557.

[4] Cited Cooper, Annals of Cambridge ii 35.

[5] He pointed out in his speech to Parliament in 1609, Works of James. I (Ed. 1616) 532, that the civil law was, "most necessary for matters of treaty with all forreine nations."

[6] In his letter of advice to Villiers in 1616 (Spedding, Letters and Life vi 39) he said, "Although I am a professor of the common law, yet am I so much a lover of truth and of learning and of my native country, that I do heartily persuade that the professors of that law called the Civilians (because the Civil law is their rules) be not discountenanced nor discouraged; else whensoever we should have ought to do with any foreign prince or state, we shall be at a miserable loss for want of learned men in that profession."

state of the two universities.[1] Both were specially directed to make adequate provision for the study of the civil law by the foundation of colleges which should be devoted entirely to this subject. At Cambridge the commissioners were directed to dissolve two or more colleges in the University, and on their site or in other fit places, by the king's authority and in his name, to found and erect a college of civil law.[2] As a result of the measures which they took Trinity Hall became a College specially but not exclusively devoted to the study of the law.[3] At Oxford All Souls was to become the civil law College of the University;[4] and here again the result of their efforts was partially but only partially successful. All Souls became, and is still at the present day, the centre of the legal studies of the University; but it, too, is not exclusively devoted to the study of the law.

The political and religious disorders of the reign of Edward VI. prevented the carrying out of large schemes of University reform;[5] and thus the efforts of the commissioners to revive the study of the civil law did not meet with much immediate success.[6] Nor was the attempt to regulate by Act of Parliament the conditions which persons must satisfy before they could practise in the ecclesiastical courts any more successful.[7] It was not till later in the century that the study of the civil law began to revive. One cause of this revival is to be found in the fact that foreign

[1] The Cambridge commission will be found in Cooper, Annals ii 25; the Oxford commission in A. Wood, History and Antiquities of the University of Oxford, published by J. Gutch ii 96-98.

[2] Cooper, Annals ii 16.

[3] It was originally intended to amalgamate Clare Hall with Trinity Hall, but the resistance of the former body was fatal to the scheme, Mullinger, op. cit. ii 134-137.

[4] The following is an extract from the commission addressed to the commissioners for Oxford University—"Et quoniam studium juris civilis non solum jam aliquot annos deserbuisse in Academia nostra Oxoniensi, verum etiam prope modum extinctum esse nobis indicatum est, præcipuam vobis omnibus curam et sollicitudinem imponimus, ut quibus poteritis viis et modis illud excitetis et amplificetis, cui studio ut possitis amplius mederi, et fructu laboris et diligentiæ juventutem ad illud accendere plenissimam ac summam auctoritatem per absolutam et regiam nostram potestatem vobis concessimus, universum numerum in lege civili studientem in collegio Beatæ Mariæ, vocatæ The New College of Oxford, in collegium Omnium Animarum, et universum numerum in artibus studientium in collegio Omnium Animarum, in Collegium prædictum Beatæ Mariæ, commutandum, transferendum, et constituendum prout vobis commodissimium fore videbitur. Sic ut in collegio Omnium Animarum tantum sint qui legis civilis studio vacabunt, et in collegio Beatæ Mariæ prædicti illi tantum sint qui artium et verbum Dei studio post hac semper incumbent," A. Wood, op. cit. ii 98.

[5] Above 40.

[6] Mullinger, op. cit. ii 137, 138; Holland, Studies in International Law, 17, 18.

[7] Stubbs, Lectures on Mediæval and Modern History 371, "Bills were introduced to lodge ecclesiastical jurisdiction in the hands of students of the universities who were admitted by the archbishop. By these, however, all special privileges of the advocates were endangered and the bills dropped after passing most stages: four bills on this point were before the Parliament of 1550."

influences had been brought to bear. On the one hand, foreign civilians were welcomed in England. Such men as Vives, Pithou the pupil of Cujas, Thomas Hannibal, Jean Hotman,[1] incorporated as Doctors in the Civil Law at Oxford; and at the same university Gentili, one of the founders of modern international law, became regius professor of civil law.[2] Jean Hotman with Gentili advised Elizabeth's government in the case of Mendoza, the Spanish ambassador;[3] and it is said on good authority that his more famous father Francis was offered a post in England.[4] On the other hand, Englishmen went abroad to study and take degrees in civil law. Tunstall, Sir Thomas Smith, and Valentine Dale are a few out of many names.[5] They qualified themselves better than they could have done at home to teach or practise law, or to serve the government in administrative or diplomatic posts.

But another, and perhaps a more important, cause for the revival of the study of the civil law is to be found in the rise of an unofficial body, analogous in many respects to the Inns of Court and the Serjeants' Inns, which did for the professors and the profession of the civil lawyers something of the work which these Inns did for the professors and the profession of the common lawyers.

The founder of this unofficial body, which became the Doctors' Commons of later days,[6] was Richard Bodewell, dean of the Arches.[7] In 1511 he formed the "Association of doctors of law and of the advocates of the church of Christ at Canterbury;" and from the following year till its dissolution in 1858 we possess the list of its members.[8] It occupied premises in Paternoster Row close to St. Paul's Cathedral. In 1565 the initiative of Dr. Henry Hervey, Master of Trinity Hall and Dean of the Arches, gave it a permanent habitation. The Masters and Fellows of Trinity Hall took from the Dean and Chapter of St. Paul's a lease for ninety-nine years of the premises, afterwards known as Doctors' Commons, on trust for the Association of Doctors of Law.[9] The lease was from time to time renewed till 1782, when Doctors' Commons, having in 1767 obtained a charter of incorporation,

[1] Nys, Le droit Romain, le droit des gens, et le collège des docteurs en droit civil 55, 56.

[2] Vol. v 52-55.

[3] Nys, op. cit. 57, 58.

[4] Maitland, English Law and the Renaissance 56-57 n. 27.

[5] See ibid 62-63 n. 33.

[6] The history of this body has been written by Nys in a work entitled, "Le droit Romain, le droit des gens, et le collège des docteurs en droit civil;" cp. L.Q.R. xxxvi 135-137; Senior, Doctors' Commons and the Old Court of Admiralty, chap. iv.

[7] Nys, op. cit. 52, 114 seqq.

[8] Ibid App. 139-155, in which an account is given of Coote's work on the lives of eminent English civilians, which was published in 180

[9] Ibid; cf. Parlt. Papers (1859) Sess. 1 xxii 22-24.

obtained Parliamentary powers to purchase the premises of which they had been lessees for upwards of two centuries.[1]

We do not know what were in early days the conditions of admission to Doctors' Commons. They possibly varied from time to time according to the regulations for the admission of advocates made by the archbishop of Canterbury. But it is probable that the conditions laid down in the charter of 1768 represented an old-established practice. They certainly represented in substance the conditions prescribed by the bills of 1550, which failed to obtain legislative sanction.[2] These conditions were as follows:— To become a fellow a candidate must have been admitted to be an advocate of the court of the Arches, and he must have been elected by a majority of the fellows. To become an advocate a candidate must have obtained the degree of Doctor of civil law at Oxford or Cambridge, after performing the exercises prescribed by those universities; he must have obtained a rescript or fiat from the archbishop of Canterbury; and he must then have been admitted during term time by the Dean of the Arches, and have attended court for a year.[3]

Thus the archbishop of Canterbury regulated the admission to the body in the members of which were vested the monopoly of practice in the courts which administered the ecclesiastical and the civil law.[4] His control over the admission to practise in the courts, other than the ecclesiastical courts, was an extension of the sphere of the archbishop's influence which was an unexpected result of the Reformation settlement. In the Middle Ages the ecclesiastical authorities had naturally regulated the conditions under which persons were admitted to practise in the ecclesiastical courts. In the sixteenth century, though the study of the canon law was discouraged, though the posts formerly open only to the canonists were now thrown open to civilians, the ecclesiastical control over the practitioners in the ecclesiastical courts survived; and the ecclesiastical jurisdiction, though somewhat curtailed, was still one of the most profitable branches of the civilians' practice. The civilians naturally wished to become advocates in these courts. But, as these advocates were civilians who practised also in the other courts in which the civil law was administered, the archbishop got control over those who practised in these courts, as well as over those who practised in the ecclesiastical courts.

[1] In Parlt. Papers (1859) Sess. 1 xxii 22-24 a full account is given of the devolution of the property, and of the ligation connected therewith.

[2] Above 234 and n. 7.

[3] Nys, op. cit. 117, 118; for the charter of 1767 see Parlt. Papers (1859) Sess. 1 xxii 21; cf. Report of the Ecclesiastical Courts Commission (1832) 13, 14. The archbishop also regulated the admission of proctors; for some account of the rules on this subject see Parlt. Papers (1826-1827) xx 511-513.

[4] For a list of these courts see below 238.

Doctors' Commons presents points of similarity both with the Inns of Court and with the Serjeants' Inns. Just as the Inns of Court comprised all those licensed to practise as barristers before the courts of common law and equity, so Doctors' Commons comprised all those licensed to practise as advocates before the courts, the principles and practice of which were allied to the civil law. Like the Inns of Court, it considered it to be its duty to see to the interests of the profession—in the seventeenth century it successfully resisted an attempt to appoint as episcopal chancellors persons who were not learned in the law.[1] On the other hand, it resembled the Serjeants' Inns in that it was not a teaching body.[2] Instruction in the civil law was left either to the two Universities, or, from the end of the sixteenth century, to the new foundation of Gresham College;[3] and a degree at one of the two universities was a condition precedent to admission. Unlike either the Inns of Court or Serjeants' Inns, it ultimately obtained a charter of incorporation. It was therefore a unique body; but it was an effective body. I cannot doubt but that the organization which the profession of the civil lawyers thus aquired materially helped forward the revival of the study of the civil law which took place at the end of this and the beginning of the following century. The fact that this organized body of civil lawyers existed encouraged the study of the civil law at the universities. The universities taught the principles of the law; and the condition of attending the courts, imposed by the Association before a Doctor could practise as advocate, ensured some training in the practical work of the courts. In this way the objects aimed at by the government in the middle of this century were, by the end of the century, accomplished. An organized body of civilians had arisen who, from that time forward, filled an important position in the state.[4]

Of the place which the civil law ultimately filled in the English legal system I cannot at this point speak fully. But by the end of the century the place which it came to fill was foreshadowed in

[1] Report of the Ecclesiastical Courts Commission (1883) 46; apparently in the sixteenth century some doubt was felt as to whether laymen could act for all purposes as judges in the ecclesiastical courts. In 1558 the Queen had appointed Haddon, Master of Requests, to the post of judge of the Prerogative Court. There was some delay in admitting him, as some thought that some ecclesiastical persons should be joined with him "for the gevinge of the censures of the Church;" Haddon was willing that this should be done; and the Council therefore ordered the Dean and Chapter of Canterbury to make no further stay, more especially as "Doctour Cooke, being a mere layman and married, had it in lyke sorte."

[2] In 1673 it demanded to be treated for purposes of assessment to taxes like the Serjeants' Inns, S.P. Dom. 1673-1675, 8, 17.

[3] Founded under the provisions of Sir Thomas Gresham's will; Gresham died in 1579, and the will took effect in 1598, after his widow's death, Stow; Survey (Ed. Kingsford) i 76.

[4] Nys, op. cit. 125 seqq.; an article in Law Mag. and Rev. (1860) ix 265, on the Civilians of Doctors' Commons; Coote, Lives of Eminent Civilians.

the various spheres of the civilians' practice. The spheres of their practice were as follows: (1) The ecclesiastical courts, where they had had a monopoly ever since the canon law had ceased to be studied.[1] (2) The region of diplomacy, where the principles of the new international law were being rapidly evolved.[2] (3) The court of Admiralty, which was, at this period, the court where the Law Merchant was being principally administered and adapted to the new commercial and maritime needs of the English state.[3] (4) The numerous arbitrations ordered by the Council in which points of foreign maritime or commercial law were involved.[4] (5) Cases occasionally brought before the Star Chamber, the Chancery, or the court of Requests, which involved the discussion of principles outside the rules of the common law.[5] (6) Many miscellaneous questions which arose in the conduct of the business of the state.[6] (7) The courts of the Constable and Marshal, and the two Universities.[7]

[1] Above 228, 232; the control which the archbishop of Canterbury had over the admission of advocates, above 236, shows that their ecclesiastical practice was regarded as the most important; in this connection they sometimes acted with the common lawyers, Dasent x 141-142 (1577-1578)—a conference of civil and common lawyers as to the use of and right to a chapel.

[2] Ibid 380 (1578)—there was a complaint of the breach of a treaty, and a D.C.L. and the judge of the Admiralty were to examine the treaty and report to the Council, "what they shall thinke may by the Civill lawe be answered;" ibid 109 (1577)—reprisals; ibid xi 303, 405 (1579-1580)—a complaint against Frenchmen who have captured English goods contrary to treaties; ibid xiii 359 (1581-1582)—a complaint of the French king as to the award in an insurance case; ibid xiv 262-263 (1586-1587)—an arrest of English merchants' goods at Rouen.

[3] Ibid iii 164 (1550)—the Admiralty was referred to as the highest court in which the civil law was practised; all the judges of court in this century were civilians and D.C.L.'s, Select Pleas of the Admiralty (S.S.) i *lix*, as were the Delegates to whom appeals lay from the Admiralty, ibid i *lxxix*; for the Delegates see vol. i 547.

[4] Dasent ii 377 (1549-1550)—the Lord Mayor was directed to appoint two English and two foreign merchants to arbitrate between the captain of a Spanish ship and a Florentine as to freight; ibid iv 92 (1552)—four D.C.L.'s were to determine a case between a French merchant and two Venetians; ibid viii 195 (1573-1574)—a foreign mercantile case; ibid 206—an insurance case; ibid x 43 (1575)—insurance laws were to be written down by some "lernid in the Civill Lawes;" ibid xiv (1586)—four D.C.L.'s were to hear an insurance case.

[5] See generally as to the jurisdictions in which the civil law had some part, Duck, op. cit. Bk. ii c. 8 pt. 3 §§ 11-32; as he says (§ 11) "ad omnes enim Curias in quibus non merum et Consuetudinarium jus, sed æquitas spectanda est, nullius gentis leges tam accomodatæ sunt quam Jus Civile Romanorum, quod amplissimas continet regulas de contractibus, testamentis, delictis, judiciis, et omnibus humanis, actionibus."

[6] We may note that in the business of foreign loans made to the government (see e.g. Dasent i 192 (1545) the advice of civilians was useful; similarly in questions which arose in connection with the great mercantile companies, see e.g. Dasent x 409 (1578), xii 146-149 (1580); in 1571 (Dasent viii 41) a curious case is recorded involving a point of private international law; it was a case of fraud committed by one Florentine on another which had been ordered by the Council to be heard by English and foreign arbitrators; the plaintiff had made out his case, but, as it concerned Florentines, the case was remitted to the Duke of Florence to see justice done; apparently the defendant had not complied with the Duke's summons, and so the Florentine nation in London were directed to see that he did so.

[7] John Tiptoft, Earl of Worcester, who had studied law in Italy and was executed in 1470, was Lord High Constable 1462-1467, Senior, op. cit. 48; see Dasent viii

It would be true therefore to say that there was something analogous to a Reception of Roman law in England. Upon certain subjects the authority of the civil law was recognized. A definite body of civilians had arisen; and the division of these civilians into two schools, according as they favoured the schools of Bartolus or of the Renaissance lawyers, is found in England as elsewhere. Sir Thomas Smith, the first Regius Professor of civil law at Cambridge, was a humanist, and favoured the school of Alciat and Cujas.[1] Albericus Gentili, Regius Professor of civil law at Oxford and one of the founders of international law, was their bitter opponent.[2] But owing to the accidents of the earlier history of the study of the canon and civil law in this country, and to the course which the Reformation here pursued, the organization of the profession of the civil lawyers, and the spheres of their influence were not firmly settled till the last quarter of the sixteenth century. On the other hand, the common lawyers were a powerful body which possessed an educational and a professional organization which enabled them to obtain the largest share of the legal business of the state.[3] Thus, though England experienced a Reception in certain departments of law, the principles so received were not developed wholly by a body of lawyers learned in the civil law;[4] and we shall see that, when the civilians had completed their educational and professional organization, a large Reception of the principles of the civil law had become impossible.[5] This series of historical accidents played no small part in determining the extent of the permanent influence which the Reception of this century exercised upon the development of English law.

The extent of that influence, and the manner in which it affected the common law must now be considered. But before I can deal adequately with these problems it is necessary to say something of the causes of the Reception, its extent, and the manner in which it was effected in the different countries in Western Europe.

221-222 (1574)—privilege of the heralds to be sued only before the earl marshal; ibid xv 285 (1587)—a collusive action to oust the university court at Oxford of its privileges because the Chancellor judged according to the civil law, which was stopped by the Council; for these courts see vol. i 169-176, 573-580.

[1] Maitland, English Law and the Renaissance 48.

[2] Holland, Studies in International Law 16, 17, "Cujas had reproached the older school with being a set of sordid barbarians . . . Gentili retorts by refusing to Alciatus and Cujas the title of jurists, which they were too ambitious of universal culture to qualify themselves for deserving. While he does not deny that their books are worth dipping into, his advice to the student is to 'visit these moderns, but to dwell with the ancients.'"

[3] Vol. ii 484-512; below 262-272.

[4] Below 271-272, 275.

The Causes of the Continental Reception, its Extent, and the Manner in which it was effected

Causes.

The universality of the theological and philosophical theories of the Middle Ages produced a universality in legal and political theory which accustomed Europe to the idea of universal and uniform codes of law. The civil law had, in consequence of the legal Renaissance of the twelfth and thirteenth centuries, influenced the law of many countries in Europe. The canon law was a still more universal system, for it regulated much of the life of the clergy, and some parts of the life of the laity throughout Western Christendom;[1] and its close connection with the civil law had been instrumental in still further extending the influence of its ideas.[2] In fact the glossators and Bartolists had made many of its rules—notably those relating to procedure[3]—a part of the system of the civil law. Then again the various commercial and maritime codes, which made up the Law Merchant, partook of the same character of universality.[4] For this reason the adoption by the various nations of Europe of rules of law drawn from these codes would not seem to be the borrowing of a foreign system of law. Rather it would seem to be a further definition, a further application of a code of rules which had already an undefined claim to obedience, and a vague application. It was not regarded as we at the present day should regard a borrowing from French or German law. It was regarded rather as a case in which it was expedient that a principle, which had long been in the air, should be taken up by the legislature or the lawyers, and defined and enforced as law.[5] It is easy to see that these mediæval ideas assisted the Reception of the sixteenth century—this century of transition from the mediæval to the modern.

[1] Cp. Woolf, op. cit. 80, 81; as Schulte says (Histoire du droit d'Allemagne, 147, 148), "Quant aux clercs, ils vivaient depuis la fin du XIIe siècle sous un régime presque totalement romain au point de vue du droit pénal, du droit civil, et du droit bénéficiaire;" for the wide jurisdiction of the ecclesiastical courts in England see vol. i 614-632.

[2] There was a mediæval proverb (cited Esmein, op. cit. 864, n 3), "Legista sine canonibus parum valet, canonista sine legibus nihil."

[3] Brissaud, op. cit. 147-149; Esmein, op. cit. 863. Duck, Bk. i c. 7 § 19, notes that without a knowledge of the canon law, "Non habemus iustam in causis forensibus procedendi formam quæ in libro secundo Decretalium continetur." Moreover there are, he says, several decisions on nice points as to the "ius naturæ et gentium," which are not to be found in the civil law.

[4] Vol. i 526-530; vol. ii 307, 309-310; below 242; vol. v 72-85.

[5] See Figgis, from Gerson to Grotius, 214; it may be noted that Althusius, Politice Methodice Digesta, chap. xxiv, recommends the magistrate to adopt rules of foreign law which might meet the needs of his own state, "Quæcunque ab aliis etiam Ethnicis ad politicam administrationem inventa et constituta sunt, magistratus etiam ad usum Reipublicæ suæ transferre et accommodare potest."

But these theories and these codes did not contain the whole of mediæval thought and mediæval law. Side by side with them we see archaic thoughts and rules of law, recalling sometimes old cultivating communities, old tribal communities, or old political arrangements; and sometimes the feudal organization which had superimposed itself upon this older order,[1]—just as we see the old courts and old rules of procedure existing side by side with the newer courts and newer procedure.[2] In the cities and boroughs,[3] in the larger states which were springing up in Europe, even in Italy itself,[4] the centre of the new legal learning, we see existing side by side these two very different orders of legal ideas. In these places the more modern tended to supersede the more ancient. But in the country at large the laws which regulated the relations between lord and vassal, or between lord and peasant, generally represented the older order. The history of the common law, and the history of the French law in the *pays des coutumes*, show that in these archaic rules of law there were many possibilities of development; but they show also that these possibilities could only be realized when the older rules had been remodelled and restated by men who were learned in the more civilized codes derived mediately or immediately from Rome. Our own Anglo-Saxon history and the history of Germany in the Middle Ages would seem to prove that the old customary law, tribal or feudal, could not develop its own principles unassisted by those legal and political ideas of Imperial Rome, which Italy was publishing to Western Europe, and adapting to its needs. It is, therefore, to these universal legal and political theories, and to the universal systems of law dependent on them—all inspired more or less directly by the legal Renaissance of the twelfth and thirteenth centuries—that we must look for the elements of progress in the legal and political thought of mediæval Europe. The idea that Roman law was of universal application, having gained admission through the theory of the Holy Roman Empire, restored to Europe the legal and political ideas of a past civilization; and the necessity of continuously reconciling these ideas with the gradually changing facts of mediæval life produced an intellectual

[1] English instances are the common field system, vol. ii 57-61; some of the doings of the local courts in the thirteenth century, ibid ii 369-395; some of the incidents of villein tenure, ibid iii 200-201.

[2] For England see ibid vol. i chap. ii.

[3] Ibid vol. i 142-151; ii 385-395; iii 269-275.

[4] English Law and the Renaissance 25 and 87 n. 56. Maitland says, "Those Italian doctors of the middle age who claimed for their science the fealty of all mankind might have been forced to admit that all was not well at home. They might call this Lombard law *ius asininum* and the law of brute beasts, but it lingered on, and indeed I read that it was not utterly driven from the kingdom of Naples until Joseph Bonaparte published the French code."

ferment from which emerged the legal and political factors of our modern world. And from this point of view it may be that this legal Renaissance of the twelfth and thirteenth centuries was of even greater importance in European history than the Renaissance and Reformation of the sixteenth century. It was to Europe and European law what on a smaller stage the Norman Conquest was to England and English law[1]—a necessary condition for the beginnings of any advance in legal or political science.

In the sixteenth century the new conditions, intellectual, religious, political, and commercial, demanded a readjustment of legal and political theory and a restatement of the law. But this was exactly the work upon which the school of the glossators, and, more especially, the school of the Bartolists, had been long engaged. Bartolus tells us that in his day the lawyers were employed in many different spheres, both legal and political.[2] The result of their work was the creation, on the basis of the civil and canon law, of a set of legal and political principles adapted to the Italy of the fourteenth and fifteenth centuries; and the political and commercial conditions prevailing in Italy during these centuries were sufficiently like the political and commercial conditions prevailing in Europe in the sixteenth century to make these principles applicable to the new order.[3] These principles, therefore, were diffused throughout Europe, and became an integral part of the intellectual equipment of the age. The disappearance of the theory of a universal Christian society comprising both church and state could not affect their existence—at most it affected the form in which they were expressed. They might be deprived of their mediæval dress, they might be amended or developed by the historical and critical learning of the Renaissance, but they were received in substance, because in and through them the political and commercial changes of the sixteenth century could find their legal expression.

Their Reception was further assisted by three sets of circumstances. (1) It was assisted by the fact that the law of the Bartolist school was not the classical Roman law, but a compound of civil and canon law adapted to the needs of the day. The Roman

[1] Vol. ii 145-146.

[2] "Quidam enim ad legendum in civitatibus regiis assumuntur, quidam ad assidendum in locis insignibus præponuntur, quidam ad advocandum in curiis principum et regiis attrahuntur, alii ad consulendum in cameris assidue requiruntur, alii ad consilium principum assumuntur. Hi enim sunt quibus respublica regenda committitur," Sermo in doct. do. Johannis de Saxoferrato 508, cited Woolf, op. cit. 19.

[3] Mr. Figgis says (R.H.S. Tr. (N.S.) xix 150), "The Italy of that day (the time of Bartolus) was rapidly developing those conditions which were to make the international politics of modern Europe find their models in the balance of power established by Cosimo de' Medici, and cause the political philosophy of the Renaissance to bow to its prince in Machiavelli."

law which was received had gone half-way to meet the facts to which its rules were to be applied.[1] "It was a foreign law," says Gierke, "but it was a living law. . . . It was the living Italian law which had passed beyond the Alps. It contained Germanic and mediæval ideas which had filtered through the Lombard law, the statutes of the towns, and the canon law. The texts were badly interpreted, not simply because the interpreters made mistakes, but because these mistakes were necessitated by practical needs."[2] This, as Nys points out, is the meaning and the justification of the rule "Quicquid non agnoscit glossa, non agnoscit curia,"[3]—the passages of the Corpus Juris which were not glossed were not living law. That this composite character of the law thus received was an element of the greatest importance in facilitating the Reception we can see from the fact that in so far as the efforts of the Renaissance lawyers were directed merely to criticism of the text, and to a restoration of the classical law, their practical influence upon legal development was inconsiderable; and that a greater practical influence was enjoyed by those who used the new learning to correct and to restate the Roman law in the form in which it had been adapted to the needs of the modern state.[4] (2) We have seen that Bartolus and other lawyers of his school had been elaborating the idea that a king or a civitas which de facto bears rule is, to that extent an empire in itself.[5] It is no mere self-sufficing πόλις, because in the eyes of the lawyers it is also "Imperial."[6] This idea tended, as Mr. Woolf has pointed out, to make men think of Roman law as being, not the law of a German emperor, but a *jus commune* for Western Europe, and therefore to make them more ready to receive its principles. (3) The Reception of a civil law which had been thus restated by the lawyers of the sixteenth century, was assisted by the decline

[1] Mr. Figgis says (R.H.S. Tr. (N.S.) xix 167, 168), "Bartolus helped to make it possible to 'receive' the civil law, and, while acknowledging allegiance to the ancient world, to adopt more or less unconsciously much that was of Christian or of mediæval origin; he influenced the political Renaissance of Europe, and he helped to make it a true development, even when it was disguised under the form of a revolution;" cp. Maitland, Political Theories of the Middle Age xv.

[2] Gierke, Deutsches Privatrecht (1895) i 13, cited Nys, Le droit romain, le droit civil et le collège des docteurs en droit civil 50.

[3] The rule in this shape was not formulated till the sixteenth century, Brissaud, op. cit. 210 n. 1; but, as he says, "On peut se demander cependant, si, en fait, on ne procédait pas, dès le quatorzième siècle, comme si elle eût existé;" for, as Sir Paul Vinogradoff points out (Roman Law in Mediæval Europe 128), the rule was necessary, "in order to avoid details too intimately connected with ancient life, and entirely unsuited for importation;" cp. Flach, Cujas, Les Glossateurs et les Bartolistes 19 n. 3.

[4] Above 226-228.

[5] Above 191; cp. Woolf, op. cit. 112 seqq.

[6] "The modern state is not only the self-sufficing πόλις, it is also 'Imperial,' and it was the lawyers, not the political philosophers, who transformed the universal empire into a system of 'Imperial states,'" Woolf, op. cit. 383.

in the importance of the canon law. Partly owing to the Reformation, partly owing to the rise of the self-contained independent state, the importance of the civil law tended to increase at the expense of the rival system.[1] It would not indeed be true to say that the canon law at once lost all its authority even in Protestant states.[2] It was far from being wholly consumed in the fire to which Luther had consigned its books. Many of its doctrines had been worked by the Bartolists into the fabric of the civil law which the sixteenth century received. It was, therefore, still appealed to even in Protestant states;[3] and, in the seventeenth century, Arthur Duck tells us that no one who aspired to be a really learned civilian could afford to neglect the canon law.[4] But when all allowances are made, it is clear that the new political and religious conditions will gradually degrade the canon law from the position of a rival of the civil law to the position of a supplement.

The victory of a civil law as thus modified and supplemented by the work of the mediæval civilians and canonists is the outward sign, the legal expression, of the sovereignty of the state. In fact its rules and ideas were the necessary instruments of publicists, statesmen, and lawyers who were seeking answers to the political, the administrative, and the legal problems set by this new age.[5] Publicists in search of arguments wherewith to attack, or support, or criticize a government, found a well-stocked arsenal in the texts of the civil and canon law, and in the books of the mediæval glossators and commentators. Statesmen set to govern a world in which the growth of a capitalistic organization, both of foreign trade and of domestic industry, was breaking up the mediæval guilds, and the mediæval agricultural arrangements based on the manor and the feudal tie between lord and tenant;[6] a world in which the competition between the several states of modern Europe

[1] Hotman, Anti-Tribonian 89, notes the decay of the canon law, "Dont est venu le proverbe *Magnus Canonista magnus asinista.* Et aujourd'huy il n'y a Canoniste, sinon qu'il soit du tout stupide et abesty . . . qui n'ait honte de sa profession;" of course we must make some allowance for Huguenot prejudices; Heineccius, Historia iuris civilis Romani ac Germani (Ed. 1740), 107, notes that the Reformation helped the Reception of the civil law because it depressed the study of the canon law; for a similar phenomenon in England see vol. i 592; above 228, 232.

[2] Duck, Bk. i c. 7; Esmein, op. cit. 863-864; Schulte, Histoire du droit de l'Allemagne 294.

[3] Duck, Bk. i c. 7 § 16.

[4] Ibid § 19, "Iurisconsulti sine coniuncta utriusque iuris scientia imperiti habebuntur."

[5] "Magno consensu," said Melanchthon, "ius Romanum tanquam oraculum nationes omnes de æquitate consulunt, sentiuntque leges et placita omnia ad hanc regulam exigi debere," Censura de Legibus, Speigelii Lexicon, col. 297; cp. Vinogradoff, Roman Law in Mediæval Europe 130, 131, for a good summary of the political, economic, and legal reasons for the Reception.

[6] Cunningham, Camb. Mod. Hist. i 493-497; this need was felt especially strongly in Holland, J. W. Wessels, History of the Roman Dutch Law 127, 212; Schulte, op. cit. 290, 291.

emphasized the need to organize all industry, agricultural or commercial, with a view to national power,[1]—found there principles which aided them to assert the supremacy of the state, to organize its machinery, and to regulate the working of that machinery. Lawyers seeking to give legal expression to these political, constitutional, and economic changes, found that they were obliged to talk and reason in terms derived from the only system of law which seemed to be as capable of meeting the needs of the modern state as of the mediæval empire.

No doubt the Reception was disliked by many different classes for many different reasons; by the feudal, the disorderly, the retrogressive elements in society, because they desired the restoration of the older law which made lawless practices easy—just as the rebels in the Pilgrimage of Grace demanded the common law unfettered by Chancery injunctions; and by other classes, and especially the peasant class, for the more valid reason that this wholesale reception of foreign principles worked some injustice to their various interests.[2] No doubt in some countries, notably Germany, it was fatal to a native and a continuous legal development;[3] and, in these later days, this has damaged its reputation in the eyes of patriotic historians who wish to construct an uninterrupted pedigree for their institutions and their law.[4] But, in the sixteenth century, it was favoured by the rising middle class, who desired protection against a turbulent nobility, a uniform law, and a more effective administration of justice.[5] When these benefits

[1] Cunningham, Camb. Mod. Hist. i 517; History of Industry and Commerce (4th Ed.) i 467-472.

[2] Heineccius, op. cit. 95, tells us of a vain attempt to banish the foreign doctors, and to bring back German law in Frederick III.'s reign. The Bavarian knights complained in 1499 that instead of judges being appointed *more antiquo*, professors of Roman law were appointed who were wholly ignorant of their customs, Brissaud, op. cit. 160. Rivier, Introd. hist. à Droit Romain, 580; J. C. Gray, Nature and Sources of Law 305, citing Stobbe, Geschichte der deutschen Rechtsquellen ii § 64 p. 95; Vinogradoff, Roman Law in Mediæval Europe 129; Schröder, op. cit. 814.

[3] J. C. Gray, op. cit. citing Stobbe, op. cit. § 65 pp. 112, 115-117, "In consequence of their measureless veneration for the foreign law, the jurists had utterly departed from the idea that the domestic German law, which was expressed in general and particular customs and statutes, was the original law, and that the Roman Law came to it in later times as the auxiliary law. . . . Instead of saying that a Roman provision stood in contradiction with the German legal consciousness, so that its application was excluded through German rules of law, they completely reversed the relation; it was the rule of the foreign law which, through a German custom or a German statute, had fallen into disuse. . . . They despised the German customs, and regarded them, so far as they did not agree with the Roman law, as evil customs."

[4] As Maitland puts it (English Law and the Renaissance 8), "Of late few writers have had a hearty good word for the Reception. We have all of us been nationalists of late. Cosmopolitanism can afford to wait its turn."

[5] Brissaud, op. cit. 160 n. 1 cites authority to show that in Germany the pleaders abandoned the courts which administered German law, and, by consent, submitted their cases to courts which administered Roman law; Sohm, Z. S. S. G. p. 76 (there

had been secured many thought it possible to kick down the ladder by which they had climbed up; and, by a careful reconstruction of past history, to restore in the name of nationalism some of those Teutonic and Germanic rules of customary law which, unassisted by the quickening influence of Roman jurisprudence, had proved themselves unequal to guiding the legal development of the modern state.[1] We must note, however, that the modern history of Germany shows that this kicking down of ladders may be a perilous process; for in Germany the elimination of the influence of Roman law meant the elimination of those moral ideas upon which Western civilization is based, and the restoration of Teutonic and Germanic law meant the restoration of much of the primitive savagery of the tribes who were governed by that law.

But however much we may minimize, however much we may deplore the Reception, it is clear that the political theories and institutions, the organization of industry and commerce, and the rules of law, public and private, prevailing in Western Europe would not have been what they are to-day, if the leading European states had not at different times, and to a varying extent, received the Roman law. To this question of the extent of the Reception we must now turn.

Extent.

The extent to which the various countries of Western Europe received the Roman law was various, and it was determined in a great degree by their past history. From this point of view they may be divided into three main classes.

1. "The Latin races," says M. Brissaud,[2] "have received everything from Rome—religion, language, law. In Italy the Greek conquest introduced Justinian's books. In Portugal the codes of Alphonso V. (1438-1481), of Emmanuel (1495-1521), of Philip II. (1591-1621), are half Roman. It is the same with Spain of the Fuero Juzgo (1229), and the Siete Partidas (1348).[3] The numerous local fueros—like the statutes of the Italian towns—do not prevent the basis of the law from being Roman." With these countries we must class the south of France—the *pays du droit écrit*[4]—where the

cited), assigns as a leading cause of the Reception the faults in the organization and procedure of the older courts; cp. Schröder, op. cit. 812; we may observe that: was just these defects which were fatal to the old local courts in England in the thirteenth and fourteenth centuries, vol. i 74-75, 133, 178-179.

[1] See Schröder, op. cit. 814; for the modern controversies between the Roman and the German Schools in Germany see Maitland, Political Theories of the Middle Age xvi-xviii; Brissaud, op. cit. 161, 162.

[2] Op. cit. 159.

[3] See ibid 330, 331 for these codes.

[4] This comprised about one third of France; see the map in Brissaud, op. cit. ol. i and p. 152.

Roman law was the basis of the legal system, in so far as it was not varied by the special customs of particular districts, or by local statutes.[1] In these provinces, Duck tells us, wills were executed, contracts were made, and cases were decided according to the civil law.[2]

2. In the Middle Ages the nations of Northern Europe presented a very different picture. Scotch institutions and Scotch law were very mediæval even at the beginning of the sixteenth century.[3] This is true also of German and Dutch institutions, and German and Dutch law up to the end of the fifteenth century. These countries had hardly been affected by the legal Renaissance of the twelfth or thirteenth centuries. Thus in Germany, Sir Paul Vinogradoff tells us,[4] "Jurisdiction and law were, as it were, pulverized into a quantity of smaller and larger fractions. Each principality, lordship, town, followed a law of its own. And apart from the disruption of these circles of territorial customs, numberless variations were produced by the social status of the parties concerned—the law of knights and of fees (*Lehnrecht*) was differentiated not only from the law of the country in general (*Landrecht*), but also from manorial law (*Hofrecht*), municipal law (*Stadtrecht*), guild law (*Zunftrecht*), peasant law (*Bauernrecht*). Besides there was the great cleavage between lay and ecclesiastical courts." Even where the customary law of a particular district had been systematized by an authoritative treatise, it was far less fitted to supply the needs of the modern state than the laws of those countries which had been more or less developed by an earlier contact with Roman Law.[5] Therefore, when in the sixteenth century a

[1] Thus Brissaud says (ibid 153) that the Roman law "tire son auctorité non pas de la promulgation oubliée de l'époque romaine, ou de l'époque barbare, mais de son caractère d'usage local . . . il varie de province à province et de siècle à siècle. La jurisprudence des quatre grands Parlements du Midi, Toulouse, Aix, Grenoble, Bordeaux, est loin d'être uniforme."

[2] Bk. ii c. 5 § 18.

[3] "Its barons still belonged to the twelfth (century) despite a thin veneer of French manners. Its institutions were rudimentary; its Parliaments were feudal assemblies," Maitland, Camb. Mod. Hist. ii 551.

[4] Roman Law in Mediæval Europe 108, 109.

[5] Schulte, op. cit. 165-170. In some places bodies of native customary law sprang up, the most famous of which is the Sachsenspiegel; it hardly shows a trace of Roman law, and its compilation so strengthened the customary law of Saxony that it was able to offer a strong resistance to the Reception. This fact, as Sir Paul Vinogradoff points out (Roman Law in Mediæval Europe 113), "proves that the wholesale reception of Roman rules is not accounted for by any inherent incompetence in German law; and cp. Schröder, op. cit. 812, 813. We should note, however, that such a compilation did not stop the Reception so effectually as bodies of law, the development of which had, like French law, been assisted by ideas drawn from Roman law. Another similar body of customary law is the Schwabenspiegel, Schulte, op. cit. 170; it is slightly more tinged by Roman ideas. In both these codes the notes and glosses of the fifteenth century show traces of the influence of the civil and canon law, Schulte, op. cit. 173, 425—the period of the Reception is approaching.

new and better system of law was necessitated by the new political conditions, these countries were obliged to accept the Roman law wholesale in the condition in which they found it. The more backward the legal system, the more wholesale the Reception, the greater the break with the past.[1]

One or two instances from the legal history of these countries will illustrate the character of the Reception which they experienced. Sir John Skene, writing of Scotch law towards the end of the sixteenth century, said: "Those who are in daily practice, in the courts consume their days and nights in learning the civil law of the Romans, and give their whole labours to the practising of it; and, neglecting the laws of their fathers, hold in no esteem the law of Scotland, which ought to be their first care."[2] In Germany the emperor regarded himself as the successor of the Roman emperors; but this had very little influence on the later Reception.[3] It was, as we shall see, due rather to the needs of the modern state; and it was accomplished by lawyers professionally trained in the civil law.[4] These lawyers gradually substituted the Roman law, as developed by the Bartolists of the Italian law schools, for the old Germanic law.[5] If it was desired to rely upon the old law, a custom allowing this must be proved; for it was always presumed that the Roman law was applicable until the contrary was proved.[6] Moreover, all statutes were interpreted in accordance with Roman principles; and a strict construction was put upon those which seemed to run counter to them.[7] Thus the principles of the older Germanic law were almost rooted out of Germany; and their restoration by the modern Germanist school has been a work of elaborate historical reconstruction.[8] The course of events in Holland and the Netherlands in the fifteenth century was very similar. Here, too, civilians got the control of the judi-

[1] Maitland, Political Theories of the Middle Age xiii, "Engiishmen are wont to fancy that the law of Germany must needs savour of the school, the lecture-room, the professor; but in truth it was just because German law savoured of nothing of the kind, but rather of the open air, oral tradition, and thoroughly unacademic doomsmen, that the law of Germany ceased to be German;" the same remarks apply to Scotland, "Scotland had been no place for lawyers, and the law . . . had been of the bookless kind," Maitland, Camb. Mod. Hist. ii 553.

[2] Green, Encyclopædia of the Law of Scotland, *sub voc.* Roman Law p. 387; Craig, Ius Feudale p. 14 § 14 (Ed. 1732), cited Green, op. cit., "Apud nos scriptarum legum, maxima inopia, et naturaliter in plerisque negotiis ius civile sequimur."

[3] Schröder, op. cit. 806; cp. Grueber, Introd. to Sohm's Institutes of Roman Law (tr. Ledlie) xxii, xxiii.

[4] Below 251.

[5] See Vinogradoff, Roman Law in Mediæval Europe 113-126, for the gradual permeation of the law books by Roman doctrine, for the juridical consultations, and for the awards on submission to arbitration (*Actensversendung*); cp. Schröder, op. cit. 810, 811.

[6] Heineccius, op. cit. 108, 109; Schulte, op. cit. 280 nn. 3 and 4; above 245 n. 3.

[7] Duck, Bk. ii c. 2 § 17; cp. Brissaud, op. cit. 161.

[8] Maitland, Political Theories of the Middle Age xvi-xviii; Brissaud, op. cit. 161, 162.

cial system, and made their civil law the common law of the country. So great was the authority of the civil law in Philip II.'s reign that it was thought necessary to repeal solemnly those parts of it which were obviously obsolete.[1] As Duck points out,[2] the Reception in Holland had effects beyond the borders of Europe. The Dutch carried their law with them to their colonies in Asia, Africa, and America, even as the English in later days have carried their common law round the world.

We can find an analogy in our own legal history to the sweeping effects of the Reception in these countries. What took place there in the latter part of the fifteenth and the sixteen centuries is not unlike what took place in England in the thirteenth and fourteenth centuries. During those centuries the courts of common law gradually reduced to insignificance the local courts and the local customs in town and country. But the reception of the sixteenth century was more catastrophic, and the law introduced was more alien, than a common law which was principally based upon the older customary law.

3. Between the two groups of countries with which I have just dealt there is an intermediate group. France, in the *pays des coutumes*, and England, retained their old customary law. But it was not pure customary law. In both cases the customs had been reshaped and restated by men who had come under the influence of the school of Bologna.[3] This reshaping and restatement saved them from destruction. They were made at once more precise and more complete, and therefore more capable of continuing to guide the life of a changing state. In the thirteenth century the influence of Roman law upon English law and upon the analogous French customary law was not dissimilar.[4] Bracton and Beaumanoir could have read and appreciated one another's books.[5] But after the thirteenth century the two countries went their several ways. While the French customary law continued to be administered by lawyers of the type of Bracton, the English common law was shaped by men whose legal training was of a very different kind.[6] Thus

[1] J. W. Wessels, History of the Roman Dutch Law 128.

[2] Bk. ii c. 5 § 42.

[3] Esmein, op. cit. 790-792; vol. ii 145-149, 176-177, 267-286.

[4] Vol. ii 270.

[5] See P. and M. ii 443-445, for an instructive comparison between the law contained in their respective works; and for Beaumanoir's work in its relation to Roman Law see Vinogradoff, Roman Law in Mediæval Europe 68 seqq. We should note that some Germanists hold "that the private law which was developed in England by a French-speaking court was just one more French *coutume*," Maitland, English Law and the Renaissance 68 n. 37; and from the point of view of the student of origins merely there is doubtless much to be said for this view.

[6] Thus France had its schools of Roman law—Montpellier for the *pays du droit écrit*, Orleans for the *pays du droit coutumier*, Vinogradoff, Roman Law in Mediæval Europe 66; there was no teaching, as there was by the Inns of Court in England, of a non-Roman system vol. ii 493-512.

all through the fourteenth and fifteenth centuries the French customary law experienced a gradual infiltration of Roman principles and Roman ideas—"an intelligent Reception."[1] This infiltration tended to become more marked with the advent of the brilliant Renaissance school of French lawyers.[2] Roman law, as Pasquier lamented,[3] tended to be regarded as a *jus commune* even in the *pays des coutumes*; and the codification of the customs, which took place in the sixteenth and seventeenth centuries,[4] did not entirely stop this tendency, because the codified law was still administered by lawyers who were trained civilians.[5] Thus, although these countries of the customary law retained many more traits of Germanic custom than the states of Germany which had received the Roman law wholesale,[6] they were nevertheless strongly tinged by Roman ideas and principles. They therefore seem Roman to an English lawyer; and it is for this reason that English lawyers from the thirteenth century onwards have been inclined to exaggerate the prevalence of Roman law on the continent.[7] Our law is so un-Roman, our minds are so unaccustomed to the concepts of Roman law, that we can with difficulty distinguish varying shades and gradations in the extent of the Reception which the different countries of Western Europe experienced. But we shall see that it is important to remember that there were these shades and gradations when we come to consider the question why there was no Reception in England in this period.

The manner in which the Reception was effected.

The manner in which the Reception was effected at different times in the different countries of Europe was very uniform. It was effected by a body of lawyers who had been trained in the civil law at the Universities. We have seen that Universities which taught law were established in France;[8] and, during the fourteenth and fifteenth centuries, such Universities were founded at Vienna, Prague, Heidelberg, Wittenberg, and other places.[9] A university

[1] Vinogradoff, Roman Law in Mediæval Europe 81.

[2] Brissaud, op. cit. 157.

[3] Lettres, Bk. ix no. 1 (Œuvres ii 563), "Et ce que m'excite encores plus le courroux, est que s'il y a quelque cas indecis par nos Coustumes, soudain nous sommes d'advis qu'il faut avoir recours au droit commun, entendans par ce droit commun le droit civil des Romains."

[4] Esmein, op. cit. 821-822.

[5] Ibid 824-825.

[6] Ibid 824; Maitland, English Law and the Renaissance 67 n. 37.

[7] Ibid 65-67.

[8] Above 249 n. 6

[9] Schröder, op. cit. 807 n. 6; Schulte, op. cit. 147; Heineccius, op. cit. 89, 90; some dates are Prague 1348, Vienna 1365, Heidelberg 1386, Rostock 1419, Greifswald 1456, Tübingen 1477, Wittenberg 1502, Frankfort 1506; Dr. Erlich has supplied me with some references to Kax-imiez Morawski, Historya Universytetu Jagiellouskiego, which show that the same process was taking place at Cracow, see Morawski, op. cit. vol. ii 94, 95, 96, 97, 98.

degree came to be considered a necessary qualification for the practice of the law;[1] and students who had learned their law, either from the famous Italian law schools, or at their native Universities, gradually invaded the courts. In Germany the decisive event was the establishment of the Imperial Chamber (Reichskammergericht) in 1495. The men by whom it was staffed, and the law which it administered, were Roman; and with every change in its constitution Roman influences were strengthened.[2] It helped to forward the Reception not by precept only, but also by example. Its forms and procedure were copied by the princes, by the cities, and at length even in the inferior courts.[3] What the emperor did for the imperial government, the princes and the cities did for their dominions. In Scotland a new court—the court of Session—was established in 1532. It was provided that half the judges should be trained civilians; and from the sixteenth to the eighteenth centuries it was customary for students to go abroad to study at foreign universities.[4] What happened in Germany and in Scotland happened also in Spain,[5] in France,[6] and in Holland.[7] Trained civilians invaded the courts, and gradually fused with, or substituted for, the old customary rules, the principles of the system in which they had been trained. "Thus it happens," said Pasquier,[8] "that the advocates, having received their training in the law schools, when they enter upon the practice of their profession, conduct their cases according to the laws of the Emperors and juris-consults . . . it

[1] Duck, Bk. ii c. 2 § 19, "In ipsa camera imperiali nemo in assessorem aut advocatum recipitur, nisi qui in aliqua Academia ius civile professus fuerit, aut in eiusdem studio quinque annos posuerit."

[2] Heineccius, op. cit. 96, 97, speaking of the law of 1507, says, "Nullus est titulus, nullus paragraphus, in quo non ius civile et canonicum, eorumque glossæ, itemque Cynus, Panormitanus, Bartolus, Baldus, Speculator, Rodfredus, similesque heroes utramque paginam faciant;" cp. Schröder, op. cit. 811; Vinogradoff, Roman Law in Mediæval Europe 126, 127.

[3] Schröder, op. cit. 807, 808, 811, 812; Vinogradoff, Roman Law in Mediæval Europe 128; Schulte, op. cit. 380, 381, says, "Dans les territoires, les cours de justice, *Hofgerichte*, furent d'abord constituées sur le modèle des tribunaux impériaux avec un ban de savants juristes qui portaient le titre de conseillers (*Hofrath*), et à côté le ban des nobles. . . . Ce développement fut à peu près le même dans les villes impériales, où on commence, même dès le xvᵉ siècle, à introduire dans les tribunaux (*Rathsgerichte*) des conseillers juristes."

[4] Green, Encyclopædia of the Law of Scotland, *sub voc.* Roman Law; cp. Goudy, Fate of Roman Law 22, 23.

[5] Duck, Bk. ii c. 6 § 29.

[6] Pasquier, Les Recherches de la France (Œuvres, ii 562) Bk. ix c. 38; cp. Esmein, op. cit. 458-459.

[7] J. W. Wessels, op. cit. 126, 127, "With the establishment of the supreme court of Mechlin the reception of Roman law as the basis of the common law was assured. . . . The judges and advocates who practised in the Supreme Court were educated in the universities where the Roman law of Justinian formed one of the most important branches of study."

[8] Les Recherches de la France (Œuvres ii 563) Bk. ix c. 38; cp. Duck, Bk. ii c. 2 § 19, "Carolus quintus Imperator constitutionum suarum interpretationem a professoribus iuris Romani in Academiis petendam esse sancivit;" Schröder, op. cit. 808.

follows that familiarity of this kind with the ancient law of Rome makes it easy to effect a fusion between it and our own law. . . . Our judges, in course of time, have transformed it into French law, not, as I have said, because we are subjects of the empire, but because these rules of the imperial law are good, just, and reasonable." These words of Pasquier are true of many countries in Europe besides France.

These trained civilians invaded not only the courts, but also the councils of kings and princes.[1] They influenced the legislature and the executive as well as the judicature. They could do this the more easily because the legislative powers of the older mediæval assemblies had for the most part been superseded by the activity of a council of professional advisers. In Germany, for instance, both the emperor and many of the princely houses brought the law of their states into line with the new jurisprudence by direct legislative action.[2] "Within some of these states or 'territories' there was in the sixteenth century a good deal of comprehensive legislation, amounting in some cases to the publication of what we might call codes. A *Landrecht* (to be contrasted with *Reichsrecht*) was issued by the prince. His legislative action was not always hampered by any assembly of Estates; he desired uniformity within his territory; and the jurists who fashioned his law book were free to romanize as much as they pleased."[3] Thus in all departments of the state the influence of the trained civilian prevailed. This in practice made for absolutism; for it meant that instead of the old mediæval customary codes a system was received which took as its axiom the "quod principi placuit legis habet vigorem" of the Institutes, and discarded the limitation with which that axiom is there accompanied. When this result had been achieved there was nothing to stop the victorious advance of Roman law.

The Extent to which the Development of English Law was influenced by the Reception

I have said something in preceding volumes of the serious limitations upon the sphere of the mediæval common law, of its rigid technical rules, and of its cumbersome procedure.[4] These defects were very obvious in this age of Renaissance and Reformation. They were partially remedied by the rise of new courts and

[1] Schröder, op. cit. 807, 808.

[2] See Heineccius, op. cit. 99, for the Constitutio criminalis Carolina of 1532; and ibid 103-105, for the same process of legislation in some of the other German states; Schulte, op. cit. 287; Maitland, English Law and the Renaissance 75, 76, and authorities there cited.

[3] Ibid 76; cp. Schulte, op. cit. 315, 316,

[4] Vol. ii 591-597; vol. iii 623-626.

councils which created new bodies of law, supplementing or rivalling the common law; and it was inevitable that these new bodies of law should be more or less influenced by the continental Reception. Was there any fear that either the existence or the supremacy of the common law would be thereby imperilled? Was there any fear that by their means England would experience a Reception? Maitland, in his famous Rede lecture,[1] has clearly indicated the gravity of this danger; and one of the points of his argument has been reinforced by Sir Paul Vinogradoff.[2] We must here endeavour to come to some conclusions as to the nature of the crisis through which English law passed in this age of the Reception, as to the manner in which it was met, and as to its results upon the development of English law.

There are four good reasons for thinking that the first half of the sixteenth century was a critical time for the common law. In the first place, there is some evidence that the business of the common law courts was declining. In the second place, we hear complaints of the defects in the law, substantive and adjective, administered by them. In the third place, the Year Books cease to appear. In the fourth place, the activity of the new courts and councils is increasing. Let us see how far these four sets of facts can be said to prove that the existence or the supremacy of the common law was in danger.

(1) There is some evidence that the business of the common lawyers and the common law courts was declining. "In 1536 John Rastell the lawyer and printer of law books complains to Cromwell that in both capacities he is in a bad way." In 1547 the students of the common law, in a petition to the Council, complained of the encroachments of the Chancery, the judges of which, it was alleged, are "Civilians and not lerned in the Comen laws." In the Michaelmas term of 1557 Stowe relates that, "men might have seen in Westminster Hall at the Kinges bench barre not two men of law before the justices;" and, "in the common place no moe sergeants but one."[3] And, in this connection, we may recall the tale related by Coke, that one of the counts of Wolsey's indictment was a charge that he had plotted to subvert the common law and substitute for it the civil and canon law.[4]

[1] English Law and the Renaissance.

[2] Reason and Conscience in Sixteenth Century Jurisprudence, L.Q.R. xxiv 373.

[3] English Law and the Renaissance 82, 83; the petition of the students of the common law to the Council is printed ibid 78-80, from Dasent ii 48-50.

[4] Coke, Second Instit. 626, and Third Instit. 208, cites the following passage as occurring in the indictment: "Antiquissimas Angliæ leges penitus subvertere et enervare universumque hoc regnum Angliæ, et eiusdem regni populum legibus imperialibus, vulgo dictis legibus civilibus, et earundem legum Canonibus imperpetuum subiugare et subducere," etc.; for the real facts see below 257-258.

All this is, as Maitland admitted, hearsay evidence. The only first-hand evidence as to the state of business in the common law courts are the rolls of those courts. From an examination of the rolls of Edward IV.'s and Henry VIII.'s reigns the question whether or no the business of these courts was declining could be answered decisively. But this would be an immense task. It would involve not merely the simple enumeration of the thousands of entries contained in each roll, but a consideration of each entry in order to see whether it related to litigious business, or whether it was the entry of some matter that had no reference to litigation, such as a fine or a recognizance. And when this had been done a still more difficult task would remain. Procedure at this period was slow and cumbersome. One case will stretch over many years and terms. In all its stages there will be many entries of essoins, appearances, adjournments, and so forth. If it was desired to count the actual number of cases before the court, it would be necessary to dissect each roll, and rearrange all these numerous entries under the head of each case. It is hardly necessary to say that no such labour as this has been attempted. What has been attempted is to compile two tables, the first to show the number of plea rolls extant for the three common law courts from the reign of Henry IV. to the reign of Elizabeth; and the second to show the number of entries relating to litigious business[1] on the rolls of certain selected terms and years in the reigns of Edward IV., Henry VIII., and Mary. No doubt many of these entries refer to the same case, so that the number of entries does not represent the number of cases before the court; but, as the same remark applies to all the rolls, the numbers may be fairly used as a basis of comparison. The principle upon which these years and terms have been selected is as follows: The reign of Edward IV. has been selected because it is clear from the Year Books that the common law courts were then full of work. The middle of the reign of Henry VIII. has been selected because it is fairly clear that then, if ever, the common law was in serious danger.[2] The Michaelmas term of 1557 has been selected in order to see whether there is any foundation for the tale related by Stowe.

[1] See note 1 to Table II. below 256.

[2] That Wolsey was willing to listen to projects of reform is clear from a petition of one Robert Ryche to Wolsey in 1528 (L. and P. iv No 4937): "Knowing Wolsey's great zeal for the reform of the common law, which, however, he is too busy to attend to, begs to be called before him that he may declare the abuses that are daily used and suggest remedies;" cp. ibid vii No. 1611 (3), draft petition of the Commons against abuses in the common law; 1611 (4) draft Act appointing a court of six to enforce statutes, to be called "conservators of the common weal," of whom only three to be barristers.

TABLE I.

TO SHOW THE NUMBER OF PLEA ROLLS IN THE COURTS OF COMMON LAW, HENRY IV.—ELIZABETH. COMPILED FROM THE LIST OF PLEA ROLLS, R.O. LISTS AND INDEXES NO. IV.

King.	Years in Reign. Fractions of a Year Counted as a Year.	Terms in Reign.	Number of Rolls in		
			K.B.	C.B.	Exch. of Pleas.
Henry IV.	14	54	54	54	12½ [1]
Henry V.	10	38	38	38	7½
Henry VI.	39	154	154	154	11
Edward IV.	22	88 [2]	86	83	21
Edward V.	1	2	2	2	1
Richard III.	3	8 or 9 [3]	9	8	2
Henry VII.	24	94	94	94	15
Henry VIII.	38	151½	150½ [4]	144 [5]	40
Edward VI.	7	26½	26½	24 [6]	11
Mary	6	21½	21 [7]	21½	20
Elizabeth	45	178½	190½ [8]	522½ [9]	171

[1] The half roll indicates that the roll covers two reigns.

[2] Reckoning Mich. and Hil. 49 Henry VI. as part of Edward IV.'s reign.

[3] Richard usurped the throne in the middle of Trinity term. The *coram rege* rolls of his reign begin with Trin. term, the C.B. rolls with the succeeding Mich. term.

[4] There is no roll in A.R. Trin. 37 for either K.B. or C.B.

[5] The record of Easter and Trinity terms is on the same roll in years 1, 10, 20; that of Mich. and Hil. in years 5 and 9; that of Easter and Mich. in year 13; that of Trinity and Mich. in year 17.

[6] The record of Easter and Trinity terms is together in years 4 and 5; and the whole of the Hilary term in which Henry VIII. died is counted as of his reign.

[7] The reign begins on these rolls with the Michaelmas term; the half of the preceding Trinity term is counted as of Edward VI.'s reign.

[8] The roll for 11-12 Eliz. is wanting. From Trin. 37-38 Eliz. to the end of the reign there are two rolls each for Hilary and Trinity terms.

[9] The following rolls are wanting: Mich. 11-22; Easter 29-30; Trin. 30; Mich. 30-31; Hil. 31; Trin. 31; Mich. 31-32; Hil. 32; Hil. 34; Easter 40; Easter 41 (two rolls). In all the years except Mich. 1-2; Trin. 2; Mich. 2-3; Hil. 4; Trin. 8; Easter 11; Hil., Easter, Trin. 12; Hil., Easter 13; Easter 14; Hil., Easter, Trin. 16; Easter, Trin. 17; Hil., Trin. 18; Easter 19; Easter 21; Trin. 22; Easter 24; Easter 28; Mich. 28-29, the rolls are in from two to six parts, e.g. in Mich. 39-40 there are six rolls containing 600 membranes each; and in Mich. 27-28 there are six rolls containing 500 membranes each.

TABLE II.

TABLE TO SHOW THE NUMBER OF CASES ENTERED ON THE ROLLS OF THE THREE COMMON LAW COURTS IN CERTAIN SELECTED TERMS AND YEARS.

	Common Pleas. (*See Notes* 1, 2, 3.)	King's Bench.	Exchequer.
Mich. 5 Edward IV.	7,645	1,174 civil and 427 crown cases	77
Trin. 5 Edward IV.	5,812		
Mich. 17 Henry VIII.	984	618 civil and 288 crown cases	2
Trin. 17 Henry VIII.	4,410		
Mich. 4, 5 Philip and Mary.	7,718	595 civil and 240 crown cases	10
Trin. 4, 5 Philip and Mary	6,840		

Notes to Table II.

[1] Common recoveries are included in these numbers as, till 25 Eliz., they were entered on the plea rolls; but Fines and such things as enrolments of bargains and sales, deeds creating tenants to the præcipe, and deeds to lead the uses declared on Fines are not included; as to the miscellaneous matters of this sort to be found on the rolls see Deputy Keeper's Report, No. 3, App. II. p. 105.

[2] In the Deputy Keeper's Report, No. 3, App. II. pp. 105-116, and No. 4, App. II. pp. 73-77, there are elaborate analyses of the number of membranes of which each of the rolls of the court of Common Pleas consists, from the beginning of Henry VIII.'s reign to the end of Mary's reign. These analyses show that there are sometimes striking variations in the size of the roll—e.g. the roll of Easter 10 Henry VIII. consists only of 88 membranes, while the rolls of Hilary and Trinity terms of the same year consist of 608 and 670 membranes respectively; the roll of Trinity 20 Henry VIII. consists of 103 membranes, while the rolls of Easter and Michaelmas terms in the same year consist of 728 and 952 membranes respectively. On the whole, however, the size of the rolls maintains a fair average uniformity. They begin to increase in size at the end of Edward VI.'s reign, and the increase is well maintained in Mary's reign. Table I. shows that in Elizabeth's reign the mass of business was so great that it was generally necessary to make up several rolls for one term. It should always be remembered that the number of membranes in the roll is not an infallible test of the number of cases, because (1) much non-litigious business is found on them, and (2) the space occupied by the entries varies very much even in part of the same roll.

[3] Mr. Baildon, in the Black Books of Lincoln's Inn, iv 297, 298, has made a computation of the number of cases on the rolls of the court of Common Pleas for the Michaelmas and Trinity terms in the years 1300, 1320, 1340, 1360, 1380, 1400, 1420. His method of computation is as follows: He has taken the average number of entries on each membrane of the roll of Hilary 1340. This roll has been selected as it is of average size. The average is 16·6. He has then counted the number of membranes in each of the selected rolls, and, to be on the safe side, has multiplied, not by 16·6, but by 15. The results work out as follows:—

	1300	1320	1340	1360	1380	1400	1420
Mich. .	5,715	5,490	9,150	6,690	9,555	9,120	8,340
Trin. .	3,000	3,270	4,620	5,410	8,415	6,510	6,600

Apparently all the entries on the roll are included.

The first Table seems to show that all through the Tudor period the business of the courts went on regularly; and that in Elizabeth's reign it increased enormously. The increase in the business of the court of Common Pleas and the court of Exchequer is particularly striking. The state of business clearly made it necessary to adopt the plan of strengthening the judicial staff of the latter court.[1] The second Table shows, in the first place, that Stowe's tale is a fable—he or his informant must have visited the court on a day on which there was some attraction which took counsel and litigants out of town. In the second place, it seems to show that, if the interpretation put upon Rastell's words by Maitland is correct, he was exaggerating the badness of the times—a fairly common characteristic of professional men. But, as I read his words, he seems to be blaming not the badness of the times so much as his extraordinary efforts in the King's cause;

[1] Vol. i 236.

and he wishes to be rewarded by being allowed to print a book which he has written on the subject.[1] If this interpretation be accepted, his letter to Cromwell has very little bearing upon the matter. We may suspect the petition of the students of the common law of an aggravated form of exaggeration, for the petition probably had a political purpose. At any rate it was used by the political opponents of Wriothesley, the Chancellor, as an excuse for getting rid of him. As for Coke's tale,[2] it is a good illustration of his historical method. The facts are as follows: the words which he cites do not occur in either of the indictments of Wolsey which are on the controlment roll of Mich. 21 Henry VIII., membs. 36 and 37. These indictments refer only to offences against the statute of Provisors. They do occur, as he says, in the Third Institute 208, on the *coram rege* roll Trin. 23 Henry VIII., mem. 14. But this is an indictment, not of Wolsey, but of Dr. Peter Lygham, clerk, the Archbishop's official of the Court of Arches, for sending a case concerning tithes to be tried before Wolsey's legatine court, and thus depriving the Archbishop of his jurisdiction. It appears that Dr. Lygham was indicted by the King's orders, the real cause of his offending being opposition to the King's designs in Convocation.[3] The indictment is a very long one, and, after reciting the provisions of the Statute of the Præmunire, goes on to assert that the late Cardinal Archbishop Thomas, now deceased, had assumed a jurisdiction in breach of it.[4] Coke never ceased to be an advocate; and he was

[1] L. and P. vii no. 1073, "I have spent four or five years in compiling books in furtherance of the King's causes and opposing the Pope, by which I have lost more than £100 worth of my business and the profits I got by the law in pleading at Westminster, to the amount of 40 marks; and I printed every year 200 or 300 reams of paper still more profitable to me. I now only get 40s. a year by the law, and have not these two years printed more than 200 reams." This interpretation is the more probable, seeing that Rastell eventually got into trouble owing to his unorthodox opinions as to tithes and probably died in prison, L. and P. x no. 248; xi no. 1487; below 311.

[2] Above 253.

[3] L. and P. v no. 394, and note; he was pardoned in consideration of a money payment, L. and P. vii no. 923 (xiii), and viii no. 169 (2 ii); but he lost his position as Dean of the Arches, L. and P. viii no. 169 (2 ii). Cranmer, however, employed him to make a visitation of his province in 1534, L. and P. vii no. 876, and it appears that in the same year he was acting as commissary-general and doctor of decrees, ibid no. 1371.

[4] The following is an extract giving the context of the words which Coke cites: "Machinans, tam dominum Regem nunc et coronam suam regiam, non solum de sua iurisdictione regia in pluribus privare vel saltem minorare et deteriorare, quam diversos huius regni Anglie prelatos et alias tam ecclesiasticas quam seculares personas de suis iurisdictionibus privilegiis viribus et hereditamentis evitare et expellere, verumeciam omnia et singula que ad potestates facultates et iurisdictiones legati de latere summi pontificis infra hoc dicti domini Regis Anglie regnum versus et super singulos et universos eiusdem domini Regis subditos nequiter practicare et exercere, finaliterque *antiquissimas Anglie leges penes subvertere et enervare universumque hoc Anglie regnum et eiusdem regni populum legibus imperialibus vulgo dictis legibus civilibus et earundem legum canonibus imperpetuum subiugare et subducere* quasdam

all through his career an enthusiastic and somewhat unscrupulous advocate of the excellence of the common law, and of its claims to be the supreme law of the State.[1] He had no doubt read the indictment of Dr. Peter Lygham of the twenty-third year of the reign, in which this accusation was made against Wolsey; and the words stuck in his mind. He had probably also read the indictments of Wolsey in the twenty-first year of the reign. When he was writing his Institutes he confused these indictments of the twenty-first year of the reign, which were really indictments of Wolsey, with the indictment of the twenty-third year of the reign, which was not and could not be an indictment of Wolsey, seeing that he was dead. He then proceeded to give to the words of the indictment of the twenty-third year of the reign a significance which their context shows they were never meant to have, using them to show that Wolsey "hated both Parliaments and the common law."[2] Clearly the words cannot be used to prove any such extensive proposition. All they show is the fact that Wolsey had, by virtue of his legatine powers, assumed a jurisdiction which properly belonged to the ordinary courts, lay or ecclesiastical.[3]

On the whole I am inclined to conclude that, though there was a decline in the business of the common law courts in Henry VIII.'s reign, owing doubtless to the activities of rival courts and councils, they still had a good deal of business left. That a good man could still earn his living at the bar is pretty clear from what Erasmus—the guest of that rising barrister Thomas More—tells us in one of his letters. Writing in 1519 to Hutten, he says that in England the pursuit of the law is so much the readiest path to distinction and gain, that many well-born youths devote themselves to the years of study necessary to become proficient in it.[4] No doubt, as we shall see, the practice of a barrister of Henry VIII.'s reign was not limited to the common law courts.[5] But the years

bullas apostolicas a sanctissimo in Christo Patre et domino Clemente divina providencia eius nominis papa septimo," etc. Then follow the dates of his obtaining and publishing the bulls, and arrogating legatine authority with regard to advowsons.

[1] Vol. v 474-477. [2] Second Instit. 626.

[3] That this was all that the case proved was recognized in the argument for Laud (supposed to have been composed by Hale) before the House of Lqrds (1644) 4 S.T. at p. 583, and in the argument of the King v. Berchet (1691) 1 Shower, K.B. at p. 115.

[4] Opera (Ed. 1703) iii no. ccccxlvii, "Quæ professio, ut est a veris litteris alienissima, ita apud Britannos cum primis habentur magni clarique, qui in hoc genere sibi pararunt auctoritatem, nec temere apud illos alia via ad rem ac gloriam parandam magis idonea. Si quidem pleramque nobilitatem illius insulæ peperit hoc studiorum genus. In eo negant quemquam absolvi posse, nisi plurimos annos insudarit. Ab hoc igitur cum non iniuria abhorreret adolescentis ingenium, melioribus rebus natum, tamen post degustatas scholasticas disciplinas, sic in hoc versatus est, ut neque consulerent quemquam libentius litigatores, neque quæstum uberiorem faceret quisquam eorum, qui nihil aliud agebant."

[5] This is clear from some bills of costs printed in Select Cases in the Star Chamber (S.S.) ii 196-205; see also below 270-272.

of study in the Inns of Court were devoted to the common law; and the evidence of Erasmus, who had peculiar means of knowing what he was talking about, taken in connection with the state of the rolls of the courts, seems to make it clear that the decline in their business is not sufficient to justify the conclusion that the life of the common law was seriously threatened.

(2) This decline in the business of the common law courts was justified by the many defects of the common law. Its language, its literature, and its rules, substantive and adjective, were an offence to many in this humanistic age. Starkey on his return from Italy—"The place most famed both with grete lerning and gud and just pollyci"—set himself to "consider and wey the custumys and manerys of myn owne cuntremen with the polycy usid here in our natyon."[1] The law he found "over confused," "without ordur or end." It should be codified, as Justinian codified the Roman law, and written in English. All lawyers should be instructed in the Latin tongue and in Roman law. But the most effectual remedy would be, "to recyve the cyvyle law of the Ramaynys, the wych ys now the commyn law almost of al Chrystyan natyonys." Starkey was not alone in his condemnation of the common law. Both Hotman and Bucer expressed similar views.[2] And though practical English lawyers were hardly prepared to accept the drastic remedy suggested by Starkey, they were prepared to admit that the general education given to the common lawyers might be improved. This is clear from the suggestions made in the paper on the Inns of Court which Denton, Bacon, and Cary drew up for Henry VIII., and from the very similar suggestions made by the author of the Doctor and Student.[3]

As a matter of fact these criticisms of Starkey were quite justified by the facts. The cumbersome technicality of the common law procedure was a scandal in the fifteenth century;[4] and it was still a scandal in the sixteenth century.[5] But it is a serious question whether suitors would have been much better off if the civil law of the Romans had been received. Those who lived under that civil law made very similar complaints; and their complaints would

[1] England in the reign of Henry VIII. (Early English Text Soc.) 192-195; the relevant passages are printed in English Law and the Renaissance 42-45.

[2] For their views see English Law and the Renaissance 59, 73.

[3] As to this report see vol. ii 503-507; for its proposals for reform and for the views of the Doctor and Student see below 268-269.

[4] Vol. iii 623-626.

[5] See a complaint of a suitor to the Council in 1586, Dasent xiv 298, 299; cp.

years. The "Compla
numerable wiles, crafts, subtleties, and delays that be in the law." This work has been printed by the Early English Text Society, see a summary in L. and P. xxii no. 733.

seem to show that Rabelais' satire was justified by the facts. In fact we may gather that both in France and in Germany legal procedure was suffering from defects very similar in character to the defects which were apparent in England.[1] Corrupt lawyers, lengthy suits, meaningless forms, were as well known in countries ruled by the civil law as in the country which was ruled by the common law. A Reception might help forward the development of a legal system which was hampered by the archaism of its rules. But it was not the survival of archaic rules which was the chief weakness of the common law—such archaic rules as still survived were of very small importance. It was the rigidity of its substantive rules and the technicality of its procedural rules which were at fault;[2] and in the technicality of its procedural rules the Roman law as administered by the Bartolist lawyers was the equal of the common law. There would be little gain in substituting one set of technicalities for another. Englishmen could appreciate this, for in England certain courts, notably the court of Admiralty, administered the civil law. Its procedure was cumbersome, and complaints of its delays were by no means uncommon.[3] In fact so unsatisfactory was its procedure in criminal cases that in 1536 Parliament substituted for it the criminal procedure of the common law;[4] and in 1535 Cromwell was being advised that it would be well to hand over to the common law all the criminal jurisdiction which the ecclesiastical courts still retained.[5] In 1557 or 1558 Thomas Williams, who was Speaker of the House of Commons in 1562-1563, gave a Reading which he entitled "the Excellency and Preheminence of the Law of England over all other humane lawes

[1] For Hotman's views see above 222 n. 7; Melanchthon, Censura de Legibus, Speigellii Lexicon, col. 250, talks of lawyers, "qui quando is quæstus est uberrimus, ex litibus lites ferunt, clientes deglubunt, Respublicas depeculantur, indoctum iudicem novis subinde technis ludificantur;" J. Oldendorp, De iure et æquitate disputatio forensis (Ed. 1611), Pref. says, "Lites nunc fiunt immortales, verborum et ceremoniarum abusu pernicioso. Sic consenescunt miseri litigatores, tandemque non nisi Cadmeam expectant victoriam: quippe quod plus impenderint quam tota res fit;" at p. 100 he talks of the abuse of forms, as a result of which, "Iudex ipsa non habeat sæpe in manu officium suum exercere in litibus: imo cogitur sedentariam audiendi operam, donec omnes istae ceremoniarum præstigiæ peragantur."

[2] See Maitland, Y.B. 1, 2 Ed. II. (S.S.) xviii.

[3] Dasent v 250, 251 (1555); vii 170 (1564); vii 243 (1565), we read, "This matter hathe been moche intricate by means of sentences gotten oute of the Coourte of the admyralte which seamed to have contradiction in themselves;" viii 297 (1574); xiii 343 (1581); nor did the Admiralty stand alone—we read in the Complaint of Roderick Mors that "it is a common prayer to be saved from the Court of Augmentations," L. and P. xxii no. 733.

[4] 28 Henry VIII. c. 15.

[5] L. and P. ix no. 119, "We think it advisable that the temporal judges should hereafter have jurisdiction of all such crimes, etc., as the ecclesiastical have heretofore had, and then there would be but one law in the realm, which I think would be better;" cp. ibid xi no. 84; we may note also that the Council of Wales, in the exercise of their criminal jurisdiction, acted under a commission of oyer and terminer in a similar manner to the ordinary courts, Skeel, The Council in the Marches of Wales, summarizing the instructions of 1525, 217, 218.

in the world asserted in a learned Reading upon the Statute 35 H. 8 c. 6 concerning tryals by jury."[1] He admits that "of late dayes" English law had been said to be inferior to the civil law in that it was unwritten, insular, and dilatory in its processes. The first two qualities he refuses to regard as defects; and as to the superiority of the English to the Civil law in speed of process he is quite content to abide the judgment of those who have had experience of both.[2] Probably Starkey's knowledge of Roman Law was derived from a study, not of the actual law applied in the Courts, but of the works of the new humanistic French school;[3] and, as we have seen, the leaders of this school were somewhat academic lawyers.[4] In fact, his views about the superiority of the Roman law to the common law, and the desirability of a sweeping Reception, were as unpractical as many of the views which he expressed as to the government of the English state.[5] Bodin was a good deal nearer the mark when he pointed out that an appeal to the Prince's extraordinary justice was the best remedy for the wearisome delays and useless technicalities of the ordinary law.[6]

The defects in the substantive and adjective rules of the common law, great though they were, did not render a Reception of Roman Law, as actually administered on the continent, probable, even if it had been possible. But it is quite true that it was these defects which made the extraordinary jurisdiction of the new courts and councils of this period absolutely necessary in the interests both of good government and of legal development. We shall see, however, that the new law which these courts and councils administered was very far from being that civil law of which Starkey spoke so highly, and that it was equally far from being that civil law which was actually being administered in many of the continental states of Western Europe.[7] But before I can deal adequately with this point I must consider the question whether the diminution in the business of the common law courts, and the defects in the common

[1] For this statute see below 538-539.

[2] English law, he says, "had been by some persons of late dayes vilified and contemned in regard that it is not a certain law digested into great volumes like the Civil Law, nor usid in any other country;" but, he remarks, "if no law were to be admitted but that which is written we should condemn the Law of Nature;" and, "whether it [the common law] be so dilatory and tedious as the Civil Law in Process of Appeal I shall submit to the judgment of them that have had experience of both."

[3] See English Law and the Renaissance 46.

[4] Above 226-227.

[5] See his suggestion, op. cit. p. 168, that the king should be chosen by Parliament, and should not succeed by hereditary right; p. 169, that there should be a permanent council to control the king when Parliament was not sitting; p. 182, that there should be an officer called the chief constable to compel the king to obey the law.

[6] Republique, Bk. iv chap. 6, "Si le Prince jugeoit, lui qui est la loy vive . . . il seroit bonne a briefe justice. . . . Aussi par ce moyen les oppositions, appellations, requestes civiles, evocations, infinité d'arrests les uns sur les autres, qui rendent les procès immortels, cesseroient."

[7] Below 274-275; vol. v 167 seqq.

law, were accompanied by a lowering of the standard of learning and knowledge among the common lawyers.

(3) It was in the reign of Henry VIII. that the Year Books finally ceased.[1] Their cessation in 1535, "at the moment when the Henrician Terror is at its height," is, says Maitland, "dramatically appropriate."[2] No adequate substitute was found for them till the second half of the century. The number of reporters in the first half of the century is small, and the quality of their work is inferior to much that is contained in the later Year Books.[3]

If it were true that the Year Books were official publications their cessation would be very significant. But there are good reasons for distrusting this view of their origin;[4] and if, as is now generally admitted, they owed their origin merely to the private enterprise of the legal profession, their cessation loses much of its significance. Moreover, as I have said, it can be explained on other grounds. Statham and Fitzherbert's printed Abridgements of the Year Books were being eagerly bought.[5] The printed editions of the Year Books were beginning to appear.[6] The lawyers still made reports for themselves,[7] but these reports were not as yet generally printed, probably because there was as yet no great demand for them. At any rate it is quite clear that the great bulk of the legal literature which was being printed in the first half of the sixteenth century was the legal literature of the common law.[8]

There is plenty of evidence that there were many accomplished lawyers trained in the first half of the sixteenth century. The Year Books of Henry VIII.'s reign, though scanty, contain some well-argued cases.[9] Plowden's reports—the most elaborate that have ever been produced—contain cases argued in 1551; and the character of the arguments is the strongest testimony to the maintenance of a high standard of learning in the profession. Indeed it would be surprising if this had not been the case. In the sixteenth century the Inns of Court and their subordinate Inns of Chancery were, as we have seen, a legal university of the best type;[10] and, in Maitland's opinion, the excellence of the

[1] Vol. ii 525, 542.

[2] English Law and the Renaissance 77.

[3] Ibid 78, "The total mass of matter from the first half of the century that we obtain under the names of Broke, Benloe, Dalison, Keilway, Moore, and Anderson is by no means large, and in many cases its quality will not bear comparison with that of the Year Books of Edward IV.;" for these reporters see vol. v 355 seqq.

[4] Vol. ii 532-536. [5] Ibid 543-545. [6] Ibid 528-529.

[7] As to Dyer and Plowden's reports see vol. v 364, 372.

[8] Maitland, English Law and the Renaissance 91, 92; vol. v 378-412.

[9] See e.g. Y.BB. 12 Henry VIII. Trin. pl. 3; Mich. pl. 2; 13 Henry VIII. Pasch. pl. 2; 14 Henry VIII. Mich. pl. 5 and 6; Hil. pl. 6 and 7; Pasch. pl. 7; 19 Henry VIII. Trin. pl. 4; 27 Henry VIII. Pasch. pl. 22; Trin. pl. 6.

[10] Vol. ii 503-512.

training which they gave to their members in the theory and practice of the common law was by itself sufficient to guarantee for the common law a flourishing existence.[1] Here I must describe a little more in detail the qualities of the training which undoubtedly had a large direct effect upon the future course of our legal history, and some indirect effect upon the development of our constitutional law in the earlier half of the seventeenth century. I have already said something of the educational curriculum imposed by the Inns of Court upon their members.[2] We shall see that there are some signs of decay in the last years of the sixteenth century and at the beginning of the seventeenth century.[3] But, during this period, this decay hardly affected the learning of the practising lawyers, who had been educated when the system of education was at the height of its vigour; and the other qualities given by that training continued to be very evident.[4] It is of these other qualities that I must here speak briefly, as it is to them, quite as much as to the legal education given by the Inns, that the victory of the common law was due.

During the whole of this period the collegiate life of the Inns of Court and the Inns of Chancery had very much the same effects upon their members as the collegiate life of the universities of Oxford and Cambridge to-day. In both cases the success of these bodies is due quite as much to the effects of the common life of their members, whether teachers or pupils, upon each other, as to the educational curriculum. The pupils not only acquired the learning which their teachers imparted, but also both they and their teachers learnt many other lessons from one another. We shall see the truth of this if we look (i) at the independent self-government of the Inns; (ii) at their numerous activities; and (iii) at the external control which helped to maintain in these independent, self-governing societies a high standard of intellectual achievement.

(i) *The Independent Self-government of the Inns.*

The independent manner in which the Inns governed themselves is very similar to the manner in which an Oxford or Cambridge College governs itself at the present day. This will be apparent if we look at a few of the entries in their records.

We get in the first place a mass of orders and rules dealing with the educational side of the life of the Inn. There are many rules as to the dates and times of readings, moots, and bolts,[5] as

[1] English Law and the Renaissance 24-28.
[2] Vol. ii 506-508. [3] Vol. vi c. 8. [4] Vol. ii 509-512.
[5] See e.g. Pension Book of Gray's Inn 4—an order as to bolts and moots; 243—an order as to readings and moots; 303-304—orders as to "exercises"; Black Books of Lincoln's Inn i *xxiv-xxvii* and references there cited; ii 165-167—orders as

to the duties of the Reader,[1] as to the persons whose attendance at readings, moots or bolts was obligatory,[2] as to penalties for non-attendance,[3] as to the conditions which must be satisfied before a student could be called to the bar.[4] The maintenance of this educational system depended, as the educational system of Oxford and Cambridge depends to-day, upon the residence of the members of the Inns in term time and in the learning vacations. It would appear that the increase in the number of students at the end of the sixteenth century was creating a class of students who lived outside the Inn. Obviously this made the requirement of residence difficult to enforce. At any rate in 1596 the judges and the four Inns found it necessary to make a rule that "none shall be admitted into Inns of Court until he may have a chamber within the House, and in the meantime to be of an Inn of Chancery."[5]

In the second place, the necessity of regulating the social life of the members of the inns, and of keeping order amongst them, accounts for another and perhaps even a larger mass of entries on the records. We have rules as to payment of commons,[6] and as to the duties and remuneration of the servants.[7] We have regulations as to dress.[8] Thus in 1588 the following orders were made by the benchers of Lincoln's Inn: "If any Felowe of this House do weare any Hatte in the Hall or Chapel, or go abrode to London or Westminster or in this House wthoute a gowne, he shall be put out of Commons, and pay such a fyne before he be remitted as the Maisters of the Bench there in commons shall assesse." A similar penalty is threatened, "if any Felowe of this House do weare long heare or greate ruffes;"[9] and both the judges and the benchers tried to stop their members from wearing beards.[10] It was found necessary to prohibit card-playing, dicing,

to the exercises to be done in the various terms and vacations; n these orders we get the curious sentence "neque post, neque pre, neque bo, neque mo, neque le," which seems to mean that no exercise is to be done either the day before or the day after the term—"neque post terminum, neque pre termino, neque bolta, neque mota, neque lectura."

[1] See e.g. Pension Book 18, 183, 184, 243-244; Inner Temple Records i 152, 211-212; some of the most important orders as to Readers were made by the Judges, see Pension Book 92, 93, 120-121, 296-297.

[2] See e.g. ibid 17, 55, 303-304; Black Books i 161, 381; ii 165-167.

[3] Ibid.

[4] See e.g. Pension Book 9, 49, 57, 80; Black Books i 100, 369, and Introd. x, xi.

[5] Inner Temple Records i 413.

[6] Pension Book 197-198. [7] Ibid 199-200, 240, 301-307.

[8] Ibid 16—"Item it is alsoe ordered that none of the societie of this house shall weare any gowne, doublett, hosse, or other outward garment of any lyght color uppon payne of expulsion owt of this house."

[9] Black Books ii 8; cf. Pension Book 67, 147-148; Inner Temple Records i 192.

[10] Black Books i 259, 310, 312; Inner Temple Records i 142; but it appears that at Lincoln's Inn these orders were revoked in spite of the wishes of the judges, Black Books i *xxxvi*.

and other similar games.[1] In 1629 the chief butler of Lincoln's Inn induced the bench to give him £30 a year compensation for the loss which the enforcement of this prohibition had caused him.[2] So far as possible disputes between members of the Inn were settled without the help of the courts. If one member brought an action against another without leave he might be fined.[3] Moreover, a member of an Inn must not appear professionally against a bencher.[4]

The Inns tried, as far as possible, to deal with the riotous conduct of their members. But this was not always possible. Serious affrays in the streets sometimes brought the delinquents before the court of the Star Chamber. In 1458 there was an affray in Fleet Street between the members of some of the Inns of Court and the citizens, in which the Queen's attorney was killed;[5] and in 1517 the Star Chamber advised the benchers of the Inns "that they should not suffer the gentlemen students to be out of their houses after six o'clock at night without very great and necessary causes, nor to wear any manner of weapon."[6] At the latter part of this period we hear less of disorder of this kind —the disorders which we hear of are rather cases of domestic insubordination,[7] sometimes of a serious kind.[8] But occasionally disputes of the members of the Inns with one another or with the outside public came before the courts. In 1602 a dispute between Merrick and Pie, two students of the Inner Temple, was before the Star Chamber.[9] Pie had had indicted Merrick who had been acquitted; and, the matter coming before the Star Chamber, the court took occasion to warn the benchers to be careful whom they admitted as students. Pie, it appeared, was a butcher's son; and the court drew the further moral that fewer should be called to

[1] Inner Temple Records i 63.

[2] Black Books ii 289-290—"the utter abolishing of dicing and carding on Saterday nightes in the Hall, would turne to his greate losse, because the greatest parte of the avayles belonging to his office thereby arising was taken away;" for a similar method of paying servants at Gray's Inn see Pension Book 36, 97.

[3] Ibid 78. [4] Black Books ii 331.

[5] Select Cases in the Star Chamber (S.S.) i *cx*, citing Stowe, Chronicle (Ed. 1631) 404.

[6] Ibid; cf. Pension Book xxv, xxvi.

[7] Mr. Fletcher says, "Manners indeed were rough. The members had to be restrained from dining in their hats, and from scrambling for their food at the dresser in the Hall. Occasionally they came to fisticuffs, and the Hall furniture generally required mending after the revels. But the murderous frays with other Societies, of which we hear in earlier times, seem to have been abandoned during Elizabeth's reign, and there is no mention in these records of duelling or stabbing," Pension Book xxxix.

[8] For riot in Lincoln's Inn Hall in 1635 of so grave a character that it attracted the notice of the judges see Black Books ii 327-329.

[9] Les Reportes del Cases in Camera Stellata 129-133; in 1613 a complaint of a violent assault on a goldsmith by a member of the Inner Temple was before the Council, Acts of the Privy Council (1613-1614) 26-27.

the bar—"they should not have calls by the dozens and scores as is now the use."[1] The Inns no doubt did their best to keep order; but it was becoming apparent that, as the Inns grew in size, and the temptations of town life became more alluring, a more personal guidance was needed to keep the students in the strait way. In 1596, in the course of a case from which it appeared that one of these young gentlemen had been defrauded, the Lord Treasurer "gave good Counsell to there Fathers yf when they sende there sonnes to th' innes of Courte to have one or two superintendents over them that maye looke ower them and certify there Freindes of there manner of lyuinge, as by experience he hathe knowne commonly used."[2]

In the third place, a large number of entries are concerned with the finance of the Inns, and the management of their property. The fees payable by the students,[3] the security taken to prevent them going off without paying for their commons,[4] levies on the members for purposes connected with the Inn, such as building of a chapel or hall,[5] orders to repair or catalogue books for the library,[6] or to purchase books[7] or manuscripts,[8] loans and other financial arrangements connected with the erection of new sets of chambers[9]—all take up a large space in the records. It is clear, too, that the Inns were willing to give pecuniary help towards deserving objects. They help a member who has fallen into distress.[10] Thomas Ashe, of Gray's Inn, was engaged on an important legal work.[11] His Inn gave him his commons till it

[1] Les Reportes at p. 133; cf. the Orders of the Judges in 1594, Dugdale, Orig. Jurid. 314.

[2] Les Reportes del Cases in Camera Stellata 47-48.

[3] Black Books i *xxxiv*, ii *xxi*; Pension Book 96, 105, 210, 315.

[4] "All suche as shal bee admitted into this Society shall enter into a bond of xli and 2 suerties with him eche in 5li apece to the Treasorers of the house for the time beinge, with condicion in effect that the party admitted shall from time to time paye all somes of money for comons pencions and other dewties dewe and dewly by him to be paid for any matter or cause whatsoever according to the orders of this house," Pension Book 130; and see also p. 150.

[5] Black Books ii 201, 203, 214—levies for building Lincoln's Inn Chapel; Dugdale, Orig. Jurid. 188—levies for building the Middle Temple Hall; Inner Temple Records i 97—an aid levied on members "for the relief of divers charges of the House."

[6] Black Books i 352.

[7] Ibid ii 75, 85, 121, 140, 162; for the attempt by Lincoln's Inn to buy Selden's books see ibid ii *xiii* and references there cited.

[8] Ibid ii 178—"the £4 10s. to be paid for the manuscript of 'the Mirror of Justices' shall come out of the Library money."

[9] See e.g. Pension Book 5-6, 10-11, 12, 35; Black Books ii *xiv*.

[10] "Ad hanc pencionem ordinatum est qd ex benevolentia Johanni Hill uni Magistrorum ex magna societate in consideratione qd secus jam diu extitit et etiam per diversa infortunia in paupertatem devenit ut jam incarceratus est ideo in ejus adminiculum ei conceditur ex dono Thesauri domus per Thesaurarios solvendum xli," Pension Book 44.

[11] This was probably the Promptuarii, generally known as the Tables to the Year Books, ibid 203 n.; Black Books ii 149 n.; for Ashe's works see vol. v 374-375.

was through the press,[1] and Lincoln's Inn sanctioned a subscription to help pay for the printing[2]—a precedent which was followed by Gray's Inn, Lincoln's Inn, and the Middle Temple, when they contributed to the cost of printing volumes two and three of this history. In 1616 Lincoln's Inn gave £20 "Towardes the buyldinge of the Schooles in Oxford."[3] A less creditable method of spending the Inn's money upon external objects is seen in a subscription by Lincoln's Inn to the public lottery of 1568.[4]

(ii) *The Numerous Activities of the Inns.*

In this, as in the preceding period,[5] the Inns of Court attracted many students who did not intend to live by the law. Many country gentlemen and members of the nobility who were, by their position, destined to take some share in the local government of the country, found that they got there a good practical preparation for these duties.[6] Thus we are not surprised to find that the Inns of Court were centres of other activities besides the study of the law. In 1616, on the occasion of Charles being created Prince of Wales, forty gentlemen of the Inns of Court tilted in the banqueting hall at Whitehall.[7] In 1617 there is mention of a body of 600 militia raised by voluntary enlistment from their members.[8] From an early date Christmas was the occasion for revels at the Inns; and at this period masques and interludes and plays, produced with much elaboration, played a great part in these revels, which were held both at Christmas and upon other occasions. "Revelling and festivity, which during the Wars of the Roses, and under the first of the Tudors had been confined to eating, drinking, and dancing, with an occasional show of jugglery or an interlude, and a strain of minstrelsy, had gradually developed into performances characterized by literary and artistic excellence."[9] In 1594-1595

[1] Pension Book 203-204, 207-208.

[2] Black Books ii 148-149.

[3] Ibid 182.

[4] "In the 10th of Elizabeth a great lottery was held in the City of London, every lot being 10s. The gentlemen of Lincoln's Inn, Furnival's Inn, and Davy's Inn 'pooled' their subscriptions, which at 10s. a lot, ought to have amounted to the round sum of £30, but in fact fell short by 28/4, which was contributed by the Governors out of the Funds of the Inn. The speculation was not successful, as the winnings only realised on division 4/3 a lot," Black Books i *xxxiv*.

[5] Vol. ii 509-510.

[6] In 1634 the bishop of London wrote a letter to the Benchers of Lincoln's Inn communicating the king's orders as to the conduct of divine service, and, in it, he says that obedience to these rules is specially important because, "verie many of the gentrie spend some part of their time in one or other of the Inns of Court, and afterwards returning to live and governe as Justices of Peace or otherwise in their severall countries, there guide themselves according to such principles as in those places are infused into them," Black Books ii 313-314.

[7] Inner Temple Records ii *xliv*, *xlv*.

[8] Black Books ii 193.

[9] Inner Temple Records i *xcvii*.

Bacon helped to compose some part of the book for the Christmas and New Year revels held by the Prince of Purpoole at Gray's Inn.[1] In 1602 Twelfth Night was played in the newly erected Hall of the Middle Temple.[2] And the fame of these entertainments soon spread beyond the borders of the Inns. On the occasion of the marriage of James I.'s daughter to the Elector Palatine in 1612-1613 two masques, one given by the Middle Temple and Lincoln's Inn, and the other by the Inner Temple and Gray's Inn, were played at Whitehall;[3] in 1614 Bacon defrayed the whole expense of the Masque of Flowers, which was acted by the members of Gray's Inn at Whitehall, to celebrate the marriage of the earl of Somerset;[4] and in 1634 a grand Masque of the four Inns played before the court at Whitehall, fills a large space in the memoirs of the period.[5] These activities show that the collegiate life of the Inns flourished during the whole of the sixteenth and early seventeenth centuries. Its vigour was a material help toward the working of a system of education based on the co-operation of all the members of these societies.

(iii) *The Control exercised over the Inns.*

The free and independent life of these societies, by helping to make their members many-sided men, increased their efficiency as lawyers. Too exclusive a study of abstract technicalities is apt to banish that sound commonsense which is the most essential basis of a successful system of law. But this freedom and independence have their weak side. The history both of the Inns of Court and of the Universities, during the latter part of the seventeenth and eighteenth centuries, was to show that an entire absence of external control leads to a self-centred life, which is blind to the growth of the most obvious abuses.[6] But there was little danger of this defect during this period. In the reign of Henry VIII. the king interested himself in the educational system of the Inns; and we have seen that the report which was drawn up on that occasion is the best account we have of its leading characteristics.[7] It would seem, too, from another part of this report, that the Inns were not

[1] For a full account of these revels and of Bacon's part therein see Spedding, Letters and Life i 325-343; it is possible, but not certain that a Comedy of Errors played on this occasion was Shakespeare's play, Inner Temple Records i *lxxii-lxxiii*.

[2] Ibid *lxxiii*; and see Manningham's Diary (C.S.) 18.

[3] Inner Temple Records ii *xxxix-xli*; cf. Spedding, op. cit. iv 343-345.

[4] Ibid 393-395.

[5] The most detailed account is to be found in Whitelocke, Memorials (Ed. 1853) i 53-62; cf. Inner Temple Records ii *xlvi-xlix*; Pension Book 317 n.—as Mr. Fletcher there says, "the enterprise was not unconnected with a desire to prove that Prynne's 'Histriomastix' did not represent the views prevalent in the profession."

[6] For the decline of the educational system of the Inns of Court see vol. vi c. 8.

[7] Vol. ii 503.

unwilling to listen to projects of reform if the king wished for reforms. But as no reforms were then taken in hand, we may presume that the king was satisfied (as he might well be) with the legal education then given.[1] It is true, as we shall see, that the system of education pursued by the Inns showed some signs of decay in the earlier part of the seventeenth century. But it is possible that, if the great Rebellion had not broken out, the older system might have been successfully reformed. The paternal government of the Tudors and the earlier Stuarts did not hesitate to interfere with the Inns of Court if they thought interference necessary; and it was backed up by the judges, who, all through this period, played the part of an efficient visitatorial board.

It would be impossible to give even a short summary of the contents of the various orders issued from time to time by the Council and the Judges. They deal with legal education, the conditions of call, the dress, and the orthodoxy of the members of the Inns;[2] and occasionally they even interfere with the freedom of election to the bench by the recommendation of favoured candidates.[3] Naturally it is the judges' orders which are the most detailed. They had all been members of the Inns; they had all as students and teachers taken their part in the system of legal education; and they were therefore the best qualified to make orders upon the various problems—educational or otherwise—which awaited the benchers who had succeeded them. Of the mass of orders to which this control of the Council and the judges gave rise[4] I shall only cite one example, in which the two forms of control were combined. In 1584[5] the Council and the judges

[1] Waterhous, Fortescutus Illustratus, 529-542, gives us a plan drawn up by Denton, Bacon, and Cary for reforming the mode of education and the organization of the Inns of Court. Maitland (English Law and the Renaissance 72) thinks that it was "a conservative proposal emanating from English barristers for bettering the education of the common lawyer;" they were to learn Latin, Greek, good French, and political science; some of them were to be sent abroad with ambassadors; two were to be selected to compile the chronicles of the kingdom. As the author of the Doctor and Student says (Bk. ii Introd. and c. 25) that all lawyers must necessarily understand French, and as (c. 46) he thinks that a general education in the principles of the law would be good for the nobility, he would have agreed with those proposals; see L. and P. xvii App. No. 2, for somewhat similar proposals.

[2] See e.g. Orders by the Council and the Judges issued in 1584 for the government of the Inns, Pension Book 61-62; Black Books i 391-392; and for further orders dealing more especially with the orthodoxy of the members of the Inns see Black Books i 370-372, 452-453; and for a good selection of orders, some of which were made by the Judges, others by the Council, and others by both, see Dugdale, Orig. Jurid. chap. lxx.

[3] Pension Book 37—Burghley recommends the bench to choose Richard Barker; ibid 48-49—he recommends Mr. Crooks as preacher; ibid 253, 255—a recommendation by the king.

[4] For some examples see Pension Book 91-93, 102-104, 120-121, 169-170, 290-291, 294-297; Black Books i *xxxvi*; ii 20-21, 47-48, 81-82, 440-442, 451-452, 454 456.

[5] Pension Book 60-62.

issued a series of orders as to admissions to chambers, as to the building of chambers, as to the necessity of making orthodox opinions and attendance at exercises a condition of the continued tenancy of chambers, as to conditions of call, as to the persons allowed to plead before the courts at Westminster and the Star Chamber, as to the expulsion of attorneys and solicitors.[1] No doubt, according to later ideas, some of these orders were an encroachment upon the autonomy of the Inns. But it was an age in which such encroachments, if made in the public interest, were not jealously criticized. In their management of the Inns, as on the larger stage of the government of the state, the Council controlled without suppressing bodies which had inherited the mediæval tradition of self-government subject to the law.[2] The usefulness of the Inns to the state, and the education of the lawyers, suffered when this control was gradually diminished.[3] Its existence was by no means the least powerful of the causes which make the sixteenth century the golden age of the Inns of Court.

The excellence of the training which they gave their members in the theory and practice of the law was by itself sufficient to guarantee the continued existence of the common law. And they possessed also another very important advantage. They were the only bodies which gave a training in the law which was at once theoretical and practical. We have seen that the study of the canon law at the Universities had been discouraged; and that the chairs of the civil law which the king had founded were as yet too new to make their influence felt.[4] There was none of that vigorous life about the legal studies of the Universities which Sir Thomas Smith so much admired in the legal studies of the Inns of Court.[5] Similarly the professional organization of the civilians was equally new.[6] Thus as organized educational bodies, as organized professional bodies, the Inns of Courts were in possession of the field. The lawyers whom they turned out were, on account of the practical nature of their training, the best fitted to undertake the actual conduct of legal business. It was therefore inevitable that they should be employed by the government as councillors, and by litigants as counsel, in the new courts and councils which were arising in this period.[7] In fact a proclamation of 1546 made their

[1] As to this matter see vol. vi c. 8.

[2] Above 163-165. [3] Vol. vi c. 8. [4] Above 232, 233.

[5] See the extract from his inaugural lecture cited Maitland, English Law and the Renaissance 89, 90. [6] Above 235-237.

[7] For the influence of the common law on the Chancery see below 277-278, 282; in the Star Chamber cases were often heard with counsel, see e.g. Dasent xv 153, xxiv 20; in the Pension Book, Gray's Inn 328 (1637), there is an order that counsellors or serjeants appearing before the Council must wear gowns; ibid 62 (1584), there is a general order to the Inns of Court that only Readers shall appear before the Star

employment by litigants necessary by providing that no person who had not read in Court was to be a pleader in the Chancery, the Common Law Courts, the Star Chamber, or the Courts of Duchy Chamber, Augmentations, Surveyors, Tenths and First Fruits, Wards and Liveries, unless appointed thereto by the Chancellor and the two Chief Justices, with the advice of the Benchers of the Inns of Court.[1] This meant that the rules and ideas of the common law were constantly in evidence in those courts and councils, and that they helped to shape the law which was there administered. As in a later age, the precise ideas of the English common lawyers as to what was just and equitable helped to permeate the Hindoo customary law with the technical conceptions of the common law,[2] so in the sixteenth century these same ideas helped to permeate the new and necessarily vaguer principles of justice which these new courts and councils were administering. It is clear that the powerful and constant influence of these trained common lawyers will tend to counteract any inclination on the part of the judges of these new courts to receive wholesale the principles of the civil law. Even in the sixteenth

Chamber; cp. Inner Temple Records i 304, 306; members of Gray's Inn filled the posts of Master of Requests, Pension Book 2 n. 2; councillor of the Marches of Wales, ibid 2 n. 4; councillor of the North, ibid 109 n. 1; in 1537, Serjeant Fairfax was added to the Council of the North, L. and P. xii Pt. 2 nos. 1076, 1077; the chief justices were members of the court of Star Chamber, and their opinion and that of the law officers of the crown was often asked for, see e.g. Dasent iii 160, 194, 214; iv 164; vii 393, 397; xi 358-360; xiii 96, 97; the opinion of the judges was taken as to the interpretation of Henry VIII.'s will, and as to the illegal commissions issued by Wriothesley, ibid ii 41-43, 54, 55; in Select Pleas in the Star Chamber (S.S.), i 187, 188 (1508) there is a judgment given by the advice of the judges—indeed Hudson says (Collect. Jurid. ii 20) that "in some cases the king's counsel and judges are properly and solely to judge," e.g. as to the validity of demurrers, ibid 165; as to title to property ibid 56, 58, 59; on questions of procedure ibid 188, 210; precedents were often followed in the Star Chamber, and this shows that the law of the court was becoming a system of case law, see Coke Fourth Instit. 64; Hudson 125, 126; and towards the end of the century Star Chamber cases got into the regular reports, see e.g. Moore (K.B.) 556, 581; it appears from the Egerton Papers (C.S.) 212, that the presence of persons learned in the law of the realm was regarded as essential to the proper conduct of the business of the Council of the North; and in 1603 it would appear that certain places were reserved for lawyers on that Council, S.P. Dom. Add. (1580-1625) 428, xxxv no. 40. The list of the Councillors of the North contained in Reid, The King's Council in the North App. ii gives a good idea of the proportions of laymen, civilians, and common lawyers; see also ibid 84, 104, 155; the counsel practising before the Council of Wales must, according to the instructions of 1574, be utter barristers of the Inns of Court (Skeel, The Council in the Marches of Wales 94); and at an earlier period Sir Thomas Englefield, Chief Justice of Chester, Sir William Sulyard, and Justice Porte were some of Lee's most valued assistants, ibid 60, 68, 69; indeed, Lee, writing to inform Cromwell of the death of Sulyard and Porte in 1540, said that he must have "learned men in their rooms," as "none other is of any help," L. and P. xv no. 398; see L. and P. xviii (ii), no. 34, for a similar statement as to the Council of the North; in 1553 John Pollard, serjeant-at-law, was made vice-president of the Council of Wales, Plowden, Rep. 89.

[1] L. and P. xxi (i) no. 1145.

[2] Maine, Village Communities 298, 299; Ilbert, Government of India (2nd ed) 330.

century there were signs that "the double jurisprudence of Rome would be overwhelmed by the enormous profession of the common lawyers."[1] Dr. Thomas Wilson who published a "Discourse upon Usury" in 1572 makes a civilian say, "these temporal lawyers do wholly drown our profession, and make us to have the less will to study, because our causes are so few that come before us;"[2] and in 1616 James I. made a similar statement.[3] In fact, the same cause which abroad led to the extension of the influence of the civil law[4] led in England to the extension of the common law. But to understand the nature and extent of this influence we must first consider the nature of the law which these new courts and councils were administering.

(4) From the earliest times it had been recognized that the common law was not the only body of law in force in England.[5] There were many courts which administered bodies of law which fell outside the sphere of the common law; and some of them administered the civil law. In the Middle Ages the canon law was administered in the ecclesiastical courts; and after the Reformation, so much of it as was consistent with the Reformation settlement was administered in the same courts by the civil lawyers who had taken the place of the canonists.[6] The civil law was also administered in the court of Admiralty, the court of the Constable and Marshal, and in the courts of the two Universities.[7] But seeing that the law which these courts administered was outside the sphere of the common law, they were not really rivals of the common law courts. It was not till the last half of the sixteenth century that the common lawyers, incited by Coke, began to covet the jurisdiction of the Admiralty over mercantile cases.[8] The fact, therefore, that the civil law was administered in some of these

[1] The Autobiographies of Gibbon, Memoir F 69; speaking of the eighteenth century Gibbon says, "Our English civilians and canonists have never been famous; their real business is confined to a small circle: and the double jurisprudence of Rome is overwhelmed by the enormous profession of the common lawyers, who, in the pursuit of honours and riches, disdain the mock Majesty of our *budge* doctors."

[2] f. 16b.

[3] Works 554-555; it was a still poorer living in the latter part of the seventeenth century, Lives of the North i 399.

[4] Above 242-245.

[5] Co. Litt. 11b enumerates fifteen varieties of law which either were or had been in force in the territories subject to the English crown:—(1) Lex Coronæ, (2) Lex et consuetudo Parliamenti, (3) Lex naturæ, (4) Communis lex Angliæ, (5) Statute law, (6) Customs reasonable, (7) Ius belli, (8) Ecclesiastical law, (9) Civil law in certain cases, (10) Forest law, (11) the law of marque or reprisals, (12) Lex mercatoria, (13) the laws of the Channel Islands, (14) the laws of the Stannaries, (15) the laws of the Marches (now abrogated); the Doctor and Student i c. 4, says that English law is founded on (1) the law of Reason, (2) the law of God, (3) General customs of the realm, (4) Maxims, (5) Particular customs, (6) Statutes; ibid ii c. 2, the law is divided into common law, the law administered in the Admiral's court, and the law administered in the spiritual court.

[6] Above 232, 236, 238.

[7] Above 238.

[8] Vol. i 553-554; vol. v 140-148.

courts is no evidence that a Reception was taking place in England No doubt the activity of the court of Admiralty increased during this period; but this may be accounted for by the expansion of foreign trade and the new conditions under which it was carried on. This new activity took place in a sphere which had never come under the influence of the common law.

But it was not only in tribunals which had always stood outside the sphere of the common law that the influence of the civil law was felt. In the Star Chamber, and in the councils dependent upon it, in the court of Chancery and the court of Requests, it had begun to make its influence felt. "In the England of Henry VIII.'s day there seems no little danger that *die fremdrechtlich geschulten Juristen*, of whom there are a good many in the king's service, will gain the upper hand in the new courts that have emerged from the council, and will proceed from *Verwaltung* to *Rechtsprechung*. There came a time when Dr. Tunstall (who got his law at Padua) was presiding over the Council of the North, and Dr. Roland Lee over the Council of the Marches." [1] These courts and councils claimed the right, not only to modify and supplement many branches of the ordinary private law of the state, but also, in the name of justice and equity, to supervise the mode in which the common law courts applied the law to individual cases. And the limitations on the sphere of the common law, and the defects of its procedure, made such interference necessary.[2]

The Council, the Star Chamber, and the branches of the Council dependent upon them acted principally (but not exclusively) (i) in those criminal cases in which, owing either to the defects of the law or the disturbed state of the country, or the power of the accused, no adequate remedy could be got at common law; or (ii) in cases in which the crown or its servants were concerned. "The new law of the Star Chamber," [3] therefore, as administered by these tribunals, affected chiefly criminal law and constitutional law. (i) We shall see that in the sphere of criminal law it made many additions to criminal law and procedure. The law as to libel regarded as a criminal offence, perjury, forgery, conspiracy, and attempts to commit crimes, was there developed. The practice of making a preliminary examination of accused persons became usual; and torture was used to discover facts whenever the Council deemed it necessary. Moreover, it possessed an elastic jurisdiction to deal with

[1] English Law and the Renaissance 70; for another projected court see above 254 n. 2; as we have seen, only three out of its six judges were to be barristers, and it was to have power to discuss all matters relating to the common weal, and to call before it all persons accused of breaking any of Henry VIII.'s statutes.

[2] Vol. ii 591-597.

[3] This was a phrase of Wolsey's, Letters and Papers i App. No. 38; for the jurisdiction exercised by the Star Chamber see vol. i 503-508; vol. v 167 seqq.

"unusual and perhaps desperate inventions, which, in short time, may be very like to endanger the very fabric of the government." [1] (ii) We have seen [2] that in the sphere of constitutional law it tended to introduce the continental idea that the crown and its servants were outside the ordinary law, that the servants of the crown were governed by special courts and a special law, and that in their dealings with the subject they were not necessarily bound by the common law. This idea is directly connected with the legal doctrines as to the position of the *princeps* which were the commonplaces of civilians.[3] It is obvious that it leads directly to the growth of a system of administrative law; and it is equally obvious that if it had prevailed the common law would have ceased to be the law of the constitution.

At the same time we should remember that, though the Council claimed to deal with cases decided by the common law courts or by other tribunals,[4] there was no attempt to supersede entirely the common law.[5] Neither the Chancery nor the common law courts wished to see the provincial Councils of Wales or the North wholly independent of the central courts of law and equity. In 1598 the Council itself adopted Egerton's view that the Council of the North could not stay proceedings in any superior court at Westminster.[6] Nor was it necessary to supersede the common law even if it had been possible. De Tocqueville has pointed out that in France one of the chief reasons for superseding the jurisdiction of the ordinary courts by special tribunals dependent on the king was the extra-ordinary independence enjoyed by these courts;[7] and that in countries where the ordinary courts were more dependent on the king they retained far more power.[8] But in England the control exercised by the king over the ordinary courts was very large, so that there was no reason to deprive them of all their jurisdiction in the sphere of public law. Thus the Council and the Star Chamber never attempted to exercise jurisdiction in cases of treason or felony; and in other cases they left the parties to their remedy at common law, if they thought that the common law could do adequate justice.

[1] Hudson, Collect. Jurid. ii 127; cp. ibid 49; so Bacon, History of Henry VII. talks of "its high and pre-eminent power in causes which might in example or consequence concern the state of the commonwealth."

[2] Above 85-87. [3] Above 192.

[4] Hudson, op. cit. 115-119.

[5] Ibid op. cit. at p. 112, notes as somewhat unusual a ruling contrary to the opinion of the judges.

[6] Reid, The King's Council in the North 347-350.

[7] L'Ancien Régime et la Révolution 77.

[8] Ibid 78, "Dans les pays, comme certaines parties de l'Allemagne, où les tribunaux ordinaires n'avaient jamais été aussi indépendants du gouvernement que les tribunaux français d'alors, pareille précaution ne fut pas prise et la justice administrative n'exista jamais. Le prince s'y trouvait assez maître des juges pour n'avoir pas besoin de commissaires."

A private person who wished to take proceedings before either of these bodies must, as a rule, show some sort of reason why he did not bring his action elsewhere.[1] Wide as their jurisdiction was, it was in a manner supplementary to that of the common law courts;[2] and, as we have seen, the counsel and some of the judges of these councils kept the conceptions and the methods of the common law constantly before them. Moreover, whatever was the extent of the jurisdiction which the central government exercised or claimed to exercise over its paid officials, the machinery of local government was not directed by these paid officials. It was directed by unpaid sheriffs and justices of the peace, carrying on their work under judicial forms and under common law or statutory rules, and permeated with the mediæval idea that, subject to the law, they could act freely in their several spheres.[3] Thus, although these new courts and councils were adding to the criminal law and were introducing new conceptions into constitutional law, they had neither the wish nor the power wholly to supersede the fundamental principles of the common law.

While these modifications were taking place in criminal and constitutional law, the Chancery was making equally notable additions to many branches of the civil law. Whether we look at the substantive or the adjective law there administered, the influence of the rules and conceptions of the canon law, and therefore to some extent of the Roman civil law, can be traced.[4] The procedure of the court of Chancery was derived from the canon law; and the Dialogue of

[1] Lambard, Archeion 141, 142, concludes that "the jurisdiction of the common court" ought not to be "hindered by this infinite authority;" but that it should assume jurisdiction "onely where either they [the common law courts] have no warrant to receive the plea, or where the tenure of their due proceedings is disturbed, or where the matter is such as deserveth to be heard upon the higher stage, or the party such as is unable to run the wearisome race of solemne Law and Processe, or where some other rare, extraordinary, and weighty considerations shall promote the same." This statement of Lambard is borne out by the Council records and other evidence; see Dasent xx 251, a suit is dismissed because "there is nothing found in the articles of complaint exhibited against them but may be remedied by the Justices of the Peace and by other ordinary means;" ibid xix 178; xxi 132, 241; xxvi 46; in the instructions to the Council of Wales, issued from 1574 onwards, it is laid down that ordinary actions are, as far as possible, to be heard at common law, Skeel, The Council in the Marches of Wales 90; in 1576 it was ordered that no suits in the nature of "replevin, debt without specialty, detinue, action on the case, or account" should be heard unless the bill were signed by two councillors, and that no suit for trespass to land be entertained, "except the complaint be first exhibited to the Justice of Assize within that county, where the cause of such suit ariseth, and he recommend the hearing of the same for that cause to the Council," ibid 95.

[2] See e.g. Chudleigh's Case, 1 Co. Rep. at p. 130a, for a case referred in 1593 from the Court of Wards to all the judges for their advice as to the legal effect of certain limitations.

[3] Above 164-165.

[4] Sir Julius Cæsar describes the procedure of the court of Requests (which was substantially similar to that of the Chancery and the Star Chamber) as "altogether according to the process of summary causes in the Civill law," Select Cases in the Court of Requests (S.S.) xxi, citing Lansd. MS. 125 f. 12; cp. Langdell, Equity Pleading, Essays in Anglo-American Legal History ii 753 seqq.; English Law and the Renaissance 85.

the Doctor and Student [1] shows that the minds of those who were framing a system of equity in the late fifteenth and sixteenth centuries were influenced by the current scholastic philosophy, as expounded in the works of the great jurist, John Gerson.[2] Their views both upon the nature of equity [3] and upon the contents of certain of its rules [4] can be connected with doctrines and speculations familiar to the Canonists. Nor is this surprising. The Chancellors of the fifteenth century were prepared to give relief on principles of abstract justice; they were prepared, that is, in a suitable case, to satisfy the demands of conscience even though their action involved a dispensation with the rigid rules of law. Once having departed from the rigid rules of law, where else could they find a criterion of right than in the current legal philosophy of the day? We at the present day might refer to expediency or public policy: the clerical chancellors of this period referred to the principles of the scholastic philosophy, and to the rules of the civil and canon law which had given to those principles a technical shape and a practical application to the solution of legal problems.[5]

It might appear, therefore, that the civil law of the state was being modified by means of continental ideas introduced through the Chancery to an even greater extent than its criminal and constitutional law was being modified by means of the continental ideas introduced through the Council and the Star Chamber. But this was not quite the case. There were in fact two sets of reasons why the Chancery, though it introduced new ideas into the English legal system, did not introduce any very great reception of Roman law rules and principles.

In the first place, because the Council and the Star Chamber were courts of a semi-judicial character, they were often animated by political quite as much as by judicial considerations; so that it was, inevitable that they should be influenced by the continental political

[1] Vinogradoff, L.Q.R. xxiv 373-384; for this book see vol. v 266-269.

[2] Sir Paul Vinogradoff points out, ibid 374, that just as "Azo was the interpreter of the Civil Law for the thirteenth-century lawyer, John Gerson was the leading exponent of School doctrines for the sixteenth-century jurist."

[3] Ibid 377-379. [4] L.Q.R. xxiv 380-384.

[5] In the Doctor and Student ii cc. 26-45, various cases from the Summa Angelica and the Summa Rossella are discussed, which contain rules for "the ordering of conscience upon the law Cannon and Civill;" but it is admitted that those cases, not being founded on the law of the realm, "do rather blind conscience than give a light unto it;" but they are cited nevertheless for the purpose of comparison; in the Practice of the Court of Chancery Unfolded (printed with Choice Cases in Chancery) 69, 70, it is said that many of the Masters are professors of the civil law, "for that a great sort of titles of that law are titles of Equity, so that they may seem best able for their skill in those titles, for the which no other law has the like, to assist the Lord Chancellor in matters of Conscience;" on the other hand, in the Treatise on the Masters, Harg. Law Tracts 291-319, a knowledge of the civil law is said, at pp. 309, 310, to be desirable, not so much to assist the Chancellor in his equitable jurisdiction, as in his jurisdiction over maritime, marital, and ecclesiastical causes, in publishing an authentic text of treaties, and in drawing up state documents.

ideas. The Chancery, on the other hand, was in the sixteenth century becoming a purely judicial court.[1] It followed that the law administered by it was far more likely to be influenced by the professional character and training of those who practised before it. But we find that from the earliest times its relations with the judges and the common law practitioners had been of the most intimate character. The Year Books show us that the serjeants and the judges assisted the Chancellor to arrive at his decisions;[2] and to the end of the history of the court the Chancellor consulted the judges on points of law.[3] The men who practised before the Chancellor were men who had been trained in the common law. Indeed, in the sixteenth century, a man could hardly have done his duty to his client unless he was familiar both with the common law and the law of the Chancery.[4] In Henry VIII.'s reign Sir Thomas More, a common lawyer, became Chancellor. He was followed by Audley, and later by Rich, both of whom had been educated as common lawyers;[5] and the court of Requests was generally assisted by the advice both of common lawyers and civilians.[6] Egerton[7] had been governor and Lent Reader at Lincoln's Inn, and, in his judgment in *Calvin's Case*,[8] he expressly disclaimed any deep knowledge of the Roman civil law. No doubt the new principles adopted by the Chancellors enlarged the horizon of the common law judges, and paved the way for important developments in the law of property, in the law of contract, and perhaps in the law of procedure. But it was men trained in the technical system of the common law who helped to give technical shape and detailed application to these principles. Thus it happened that the principles of the common law had as great an influence upon the new law of the Chancery as the new law of the Chancery had upon the development of the common law. We can see their

[1] Vol. i 409-412, 454-459.

[2] See e.g. Y.BB. 37 Henry VI. Hil. pl. 3; 39 Henry VI. Mich. pl. 36; 22 Edward IV. Pasch. pl. 18; 4 Henry VII. Hil. pl. 10; Select Cases in Chancery (S.S.) 139, 140, 150; Moore's Rep. (K.B.) 552, 553; Spence, Equity i 387, 406, 383 n. *g*; vol. v 220-222.

[3] Spence, Equity, 383 n. *h*.

[4] It is clear that counsel were familiar with both laws, and advised their clients to sue in one court or the other according to the facts of the case, see e.g. an opinion of Kingsmill (1498-1499) in the Plumpton Correspondence (C.S.) 132, 133; and a letter of Thomas Cromwell (1527) advising as to a suit in which he was retained, Merriman, Life and Letters i 316-318; Plowden acted as a counsel in the Chancery, Spence, Equity 387 n. *f*; Lambard, Archeion 83, says that in the Chancery are "men no lesse learned in the Common Lawes of this Realme than accomplished with the skill of this Moderation of Equity;" cp. Doctor and Student i c. 17.

[5] Foss, Judges v 126-127, 318; Cordell M.R. 1557, was Lent Reader in the Inner Temple 1553-1554.

[6] Lambard, Archeion 227.

[7] Vol. v 231-236.

[8] "Whatsoever I have spoken or shall happen to speake of the civile lawe . . . I pray favor of my masters that professe it . . . I professe it not; I have learned little of it," 2 S.T. at p. 673.

influence, for instance, in the law of procedure and pleading[1]—the parties come to issue as at common law;[2] and we can see it in the fact that by the end of the century the law of the Chancery is showing signs of becoming a system of case law. It is not surprising, therefore, to find that in the early Chancery cases there is very little reference to the technical rules of the civil and canon law, and very frequent reference to the rules of the common law.[3] The principles and speculations of foreign canonists and civilians may have helped to inform the consciences of the Chancellor and his officials as to the kind of rule which would be considered fair and just—just as the books of canonists and the civilians of the twelfth and thirteenth centuries helped to inform the fathers of the common law as to the necessary characteristics of a civilized body of law. But the law actually administered in the Chancery was based far more upon general principles of fairness and justice applied both to the facts of the case before the court, and to the common law rule applicable to those facts, than upon any technical rules of the civil or canon law.[4]

In the second place the position assigned by the legal theory of the fifteenth and sixteenth centuries to conscience or equity prevented the principles laid down in the Chancery from being in any sense subversive of the principles of the common law.

We have seen that in the Middle Ages all courts of law would have professed rightly and duly to administer both law and equity.

[1] Select Cases in Chancery (S.S.) 56, 57, a declaration in detinue which closely follows the common law forms; 137-140, pleadings and judgment very similar to those at common law; Calendar of Chancery Proceedings (R.C.) ii *lx*, a departure in pleading alleged; *lxiii*, a plea with a protestation; the common law system of pleading seems similarly to have influenced the system of pleading in the Star Chamber, Hudson, op. cit. 161, 191; Select Cases in the Star Chamber (S.S.) i 44, 59, 60, 71-80, 103, 232.

[2] Langdell, Equity Pleading, Essays in Anglo-American Legal History ii 775, 776; in a book called the Attourney's Academy (1623) we can see that the rules as to Bill, Answer, Reply, and Rejoinder are well settled; cp. Select Cases in Chancery (S.S.) Cases 141 (1455-1456), and 147 (1467-1473); it is noteworthy that the practice of examining witnesses to inform the conscience of the court—a practice evidently derived from civil law methods of procedure, Stephen, Pleading (5th ed.) 137, 138—lasted only till the time of Lord Bacon, Spence, Equity i 380, 381; and cp. Hudson, op. cit. 24, for a similar development in the Star Chamber; this would seem to show that the peculiar characteristics of the common law system of pleading—the development of the issue only by the allegations of the parties—had prevailed in the Chancery. We may perhaps see a sort of parallel in the manner in which in Roman law some of the features of the *Legis actio* procedure influenced the formulary procedure.

[3] This is apparent if we look at the Select Cases in Chancery (S.S.), and the cases in the introduction of the two volumes of the Calendar of Early Chancery Proceedings (R.C.).

[4] As Kerly says, Equity 101, "It is not clear that any of the doctrines of early equity can be traced to the Civil Law. . . . The Civil Law was referred to as a repertory of moral principles, and, as such, it was accepted, not only in our Court of Chancery, but throughout the Western World."

In the time of Bracton and later, there is no doubt that the king's courts were fully competent to do equity.[1] But the growing fixity of the common law, and the growing technicality of its procedure, had caused the claims of equity to retire into the background.[2] In the sixteenth century, both in England and elsewhere, the growth of the conception of sovereignty tended to alter that position of equity and to diminish its importance. Men's conception of the relations of law and equity was naturally affected by the substitution of the background of material force, on which the sovereign state was based, for the religious and moral background which underlay the political theories of the Middle Ages. The more completely law came to depend on the command of the sovereign, the less scope there was for its modification by the admission of equitable principles. Equity, as Plowden pointed out, might be appealed to in the interpretation of the commands of the sovereign legislator to give them now a larger, now a more restricted scope, in the interests either of justice or of conformity to established principle;[3] but he makes it quite clear that the lawyers of his day had ceased to regard it as a set of moral principles which should habitually influence the conduct of the judges in the decision of concrete cases.

Perhaps the growing respect paid to the authority of decided cases was one of the causes which helped to eliminate ideas of equity from the common law, more completely than they were eliminated from bodies of law which were based upon a jurisprudence derived from the Roman civil law. But the very completeness with which they were eliminated from the common law made it necessary that some provision should be made for their recognition.[4] That provision was made by entrusting their administration to a special court—the Chancery. Its power and jurisdiction increased in extent as the rules of the common law grew more fixed; and the result was that the strictly mediæval conception of equity had a longer life in England than in any other country in Europe, and a history which was quite unique.

That the equitable principles administered by the Chancery in the sixteenth century were based upon the strictly mediæval conception is clear from the dialogue of the Doctor and Student. The writer adopts the mediæval point of view which regarded the world as ruled primarily by the law of God and by the law of nature or reason, and only secondarily by the human law of the

[1] Vol. ii 245-252, 334-344. [2] Ibid 345-347, 592-595.
[3] Plowden 465-468.
[4] James I. said, Works 559, "There is no kingdom but hath a court of equity, either by itself as is here in England, or else mixed and incorporate in their Office that are judges in the law, as it is in Scotland: but the order in England is much more perfect when they are divided."

particular state.[1] It followed that no human law which was contrary to these universal laws was valid; for their existence and validity was presupposed by all human laws.[2] Now a human law might be perfectly consonant to these laws, and therefore perfectly valid. It might be a perfectly fair general rule; and yet, when it came to be applied to some particular case, it might work manifest wrong. It was particular cases of this kind which called for the intervention of conscience or equity.[3] Thus the rules of equity were really special applications of the overriding law of God or of reason or nature to the treatment by merely human law of particular cases.[4] The human law of the state, therefore, was the foundation of rules of equity; for these rules were called into existence by the presence of some hardship resulting from the manner in which this human law dealt with a particular case. The Doctor and Student over and over again emphasizes the fact that the law of the state—whether it be the common law or the Roman civil law—is the starting-point of equity.[5] The rules of equity, therefore, do not form a distinct and rival system of law: they are a part of all systems of law, needed by all systems of law in order to ensure that the application of legal rules shall conform to the law of God and the law of reason or nature, as completely as the rules themselves.[6] Thus neither the Doctor and Student nor Coke

[1] Doctor and Student i c. 1, "When the law eternal or the will of God is knowne to his creatures reasonable by the light of natural understanding, or by the light of natural reason, that is called the law of reason: and when it is showed of heavenly revelation . . . then it is called the law of God. And when it is showed unto him by order of a Prince, or of any other secondarie gouvernoure, that hath power to set a law upon his subjects, then it is called a law of man, though originally it be made of God."

[2] Ibid i c. 19, "For if any law made of men bind any person to anything that is against the said laws (the law of reason or the law of God) it is no law, but a corruption, and a manifest error;" ibid i cc. 2 and 4.

[3] Ibid i c. 16, "Since the deeds and acts of men, for which laws have been ordained, happen in divers manners infinitely, it is not possible to make any general rule of law, but it shall fail in some case . . . and therefore to follow the words of the law were in some case both against justice and the commonwealth wherefore in some cases it is necessary to leave the words of the law, and to follow that reason and justice requireth, and to that intent equity is ordained: that is to say to temper and mitigate the rigour of the law;" ibid ii c. 15; the Earl of Oxford's Case (1616) 1 Ch. Rep. at p. 6.

[4] Doctor and Student i c. 16, It is "an exception of the law of God or of the law of reason from the general rules of the law of man, when they, by reason of their generality, would in any particular case judge against the law of God or the law of reason, the which exception is secretly understood in every general rule of every positive law . . . wherefore it appeareth if any law were made by a man without any such exception expressed or implied, it were manifestly unreasonable . . . for such case might come that he that would observe the law should break both the law of God and the law of reason."

[5] Ibid i c. 26, "Conscience must always be grounded upon some law;" cp. ibid i cc. 16, 17, 19; ii Introd. cc. 15 and 19; see above 276 n. 5 for "the sums called Summa Angelica and Summa Rosella" of cases of conscience founded on the canon and civil law discussed by the Doctor.

[6] Ibid i c. 16, "Equity is a rightwiseness that considereth all the particular circumstances of the deed. . . . And such an equity must alwaies be observed in

regard the rules of equity as a separate part of the law of England.[1] They are rather a necessary modification, and therefore a necessary part, of the common law, to be known and administered by the lawyers in order to do complete justice,[2] and in order to fulfil the object of all law, which is, according to Aristotle, to make men good.[3] Civil and canon law treatises might be useful as illustrating the working of the rules of conscience or equity as applied to those systems of law: in England they were of small importance compared with a knowledge of the common law upon which the rules of conscience or equity must in England be necessarily founded.[4]

This conception of equity as an essential part of the law, needed in order that the law in its application to concrete facts might not contravene the law of God or of reason, was applied, in the earlier part of the sixteenth century, to determine the limit of its interference with the law—a difficult question "to be understood in divers manners and after divers rules."[5] The most general theory seems to have been somewhat as follows: Some human laws are grounded directly upon the law of God or of reason, e.g. laws forbidding murder or fraudulent dealing. Others are grounded merely upon the circumstances of particular states at a particular time, e.g. the law as to the solemnities needed to make a contract, or the law as to the modes in which property may be acquired.[6] As a general rule equity should interfere if any law as applied in a particular case contravenes a principle of the law of God or of reason, if, e.g., it leads to harsh or unfair dealing.[7] But if the law is merely a human law founded on the circumstances of some particular state, the intervention of equity may, by the terms of the law, be expressly or by implication forbidden.[8] In such a case the hardship resulting to the individual

every law of man, and in every general rule thereof;" c. 17, a statute which excluded all equity would be "against right and conscience."

[1] Above 272 n. 5. [2] Cp. above 277 n. 4.

[3] Doctor and Student i c. 4, "And the Philosopher said in the third booke of his Ethickes that the intent of a maker of a law is to make the people good, and to bring them to vertue."

[4] Above 280. [5] Doctor and Student i c. 19.

[6] Ibid c. 21; ii c. 3. [7] Above 280.

[8] See e.g. Doctor and Student i c. 25, for a discussion of the question whether a fine levied with proclamations extinguishes the right of a stranger in conscience as it does in law; c. 32, for a discussion of the question whether common recoveries should be held valid in equity, seeing that they are founded on an evasion of Stat. West. II. the conclusion arrived at is that they should either be prohibited, or that men should be allowed to sell their entailed lands by "bare feoffment," in order to avoid the expense, and offence in conscience to which they give rise; ii c. 56, the effects of a collateral warranty is discussed, and the general rule is deduced that, "Where the common law in cases concerning inheritance putteth the party from any averment for eschewing of an inconvenience . . . if the same inconvenience should follow in the Chancery if the same matter should be pleaded there, that no *sub pena* should lie,"

must be suffered in the interests of the state. The only remedy is an appeal to the conscience of the wrong-doer.[1]

As the sixteenth century advanced, the Chancery developed a definite set of principles, which were, in some cases, directly antagonistic to the principles of the common law. It became, therefore, more and more impossible to hold the view that law and equity were one coherent system of rules. In the middle of the fifteenth century a plaintiff in the Chancery can talk of "the lawe of consciens, whiche ys lawe executory in this courte for defaute of remedy by cours of the common lawe;"[2] and the Year Books show that antagonism between the common law and the law of the Chancery was beginning about this period.[3] The Doctor and Student in terms admits that equity might also be considered to be a separate ground of the law of England.[4] But though equity had become a distinct system by the end of the century, its origin, and the environment in which it had grown up, prevented it from ever becoming a system wholly dissociated from the common law. Writers from the sixteenth century to the nineteenth have emphasized its dependence upon the law.[5] Even Bacon admitted[6] that "The common law hath a kind of rule and survey over the chancery, to determine what belongs to the chancery." "Equity follows the law," because, in the words of Maitland, equity is a "supplementary law—a sort of appendix added on to our code, or a sort of gloss written round our code," which, "at every point presupposed the existence of common law."[7] If the relation between law and equity has been of this character ever since equity became a distinct system, if in earlier times their relation was still more intimate, it is clear that the

[1] The Doctor and Student i c. 18, speaking of the statute of 4 Henry IV. c. 23 (as to the effect of judgments in the King's Courts, vol. i 462) says, "It is much more provided for in the law of England that hurt nor damage should not come to many than only to one . . . and in many cases where a man doth wrong yet he shall not be compelled by way of compulsion to reform it, for many times it must be left to the conscience of the party whether he will redress it or not;" cp. ibid ii cc. 3 and 50.

[2] Select Cases in Chancery (S.S.) 146.

[3] Vol. i 459-461; vol. ii 594-595; vol. v 221.

[4] i c. 17, "It had not been inconvenient to have assigned such remedie in the Chauncerie upon such equities for the seventh ground of the law of England: but forasmuch as no record remainith in the King's court of no such bill ne of the writ of *sub pena* or injunction . . . it is not set as a speciall ground of the law, but as a thing that is suffered by the law." This explains the importance in the legal theory of the sixteenth century of holding or not holding a court to be a court of record; see vol. v 157-161.

[5] Above 280-281; Little Treatise concerning writs of *sub pena*, Harg. Law Tracts 353; Norburie, Abuses of the Chancery, ibid at p. 444, "Law and Conscience are so linked together that they are hardly to be severed, and conscience must always be founded on some law."

[6] Reading on the Statute of Uses, Works (Ed. Spedding) vii 415.

[7] Maitland, Equity 18, 19,

existence of the common law was not threatened by the development of equity in the sixteenth century.

I do not think, therefore, that any of the four reasons alleged for supposing that the existence of the common law was in danger in this age of the Reception are really conclusive; and in support of this opinion two further reasons can be adduced. (1) If ever the existence of the common law was in serious danger it was in the reign of Henry VIII. But to suppose that Henry VIII. cherished a design of subverting the common law is to suppose that his policy in regard to the law was wholly contrary to his policy in regard to the constitution and the church. The frame of the constitution depended upon the common law;[1] and in all constitutional questions Henry scrupulously observed the letter of the law.[2] The common law gave him most of the powers which he required; and he could get additional powers from Parliament. It is quite inconceivable that Parliament would have assented to a project to subvert the common law;[3] and Henry was not the man to attempt a design at once unpopular and useless. We have seen that he introduced into Wales and the Marches all the apparatus of English local government; and that he gave Wales the right to send representatives to Parliament.[4] His ecclesiastical policy was founded upon a supposed restoration of the old constitutional order. The king who penned the preamble to the Statute of Appeals was the last man to desire a violent breach in the continuity of the law of the state.[5] (2) Throughout the sixteenth century the monarchy of England was a constitutional monarchy. Even Henry VIII. recognized that the law could be changed by Parliament alone.[6] The continuous existence of Parliament and the continuous exercise of its powers were clearly a great security for the existence of the common law. It prevented the acceptance of the doctrines of the civil law which ascribed a legislative authority to the will

[1] In the Doctor and Student i c. 7, it is pointed out that, "The custome of the Realme is the verie ground of divers courts in the Realme;" and ibid c. 28, that Parliament "is alway taken for the most high Court in this Realme, before any other." [2] See L. and P. xiii *i* no. 1333; cited above 201 n. 7.

[3] It appears that it took Cromwell four years to get Parliament to acquiesce in the Statute of Proclamations, Merriman, Life of Cromwell i 123, 124; and for the difficulties Henry found in passing the Statute of Uses see below 450-457.

[4] Above 37-38.

[5] 24 Henry VIII. c. 12; cp. vol. i 589-590; as is pointed out in 1542 by a writer who advocated some measures of law reform, the common law was far more in harmony with Henry's ecclesiastical settlement than the civil or canon law, L. and P. xvii App. No. 1.

[6] See the remarkable letter of Gardiner to Protector Somerset in 1 S.T. at p. 588 cited above 102; all English writers on political theory in this period recognize the constitutional character of the English monarchy, above 209-215

of the *princeps*. It prevented, therefore, sweeping changes in the legal code by a mere ordinance of the king and his council. The existence of the Parliament depended upon the common law, and the common law preserved the mediæval idea that in the state the law was supreme.

But though I am inclined to think that the existence of the common law was not endangered in the first half of the sixteenth century, I am of opinion that its supremacy was in very serious danger. We have seen that throughout the sixteenth century the moving force of the constitution was the Council, and that it exercised an active control over all the machinery of government, and over the whole administration of the law.[1] If the Council had continued to exercise these large powers of control over the judicial system, it is quite clear that the Star Chamber, the Admiralty, and the court of Requests would have continued to wield a very large jurisdiction. The jurisdiction which they would have possessed would have deprived the common law courts of a large part of their jurisdiction over constitutional law, of some part of their jurisdiction over criminal law, and of nearly all their jurisdiction over commercial law.[2] The result of the victory of the Chancery over the common law courts in James I.'s reign was to take away from the common law its exclusive control over large parts of the private law of the state.[3] If all these other courts had been equally successful, the common law would have become of very small importance indeed.

At the end of the Tudor period it was becoming clear that a struggle for supremacy was imminent between the common law courts and these new and rival jurisdictions. In fact, we can see that the Tudors had left the legal institutions of the English state in much the same position of unstable equilibrium as they had left its political and ecclesiastical institutions. The new had been placed side by side with the old, and no attempt had been made to define their respective spheres. A continuance of the harmonious working of these diverse institutions depended on the personality of the Tudor sovereigns, and on a continuance of the causes which made their strong rule a necessity to the safety of the state. Thus it was that when their direct line failed, and when the circumstances which had made their strong rule necessary ceased to exist, a general conflict ensued. The struggle between the common law courts and their rivals was merged in the larger political and ecclesiastical questions which at once came to the front. The majority of the common lawyers naturally gravitated to the side of the Parliament, because, as I have said, the powers of Parliament were the great security for the supremacy of the common law, and it was by

[1] Above 70-107. [2] Vol. i 504-507, 552-558. [3] Ibid 463-465.

the common law that the position of Parliament was most fully recognized. It was the victory of the Parliament which ultimately gave back to the common law that supremacy which had nearly disappeared in the sixteenth century.

How far, then, is it true to say that England experienced anything analogous to the continental Reception? I think that it would be true to say that England, though it did not experience anything that we can call a Reception of Roman law, was affected by analogous influences, because, in England as elsewhere, it was necessary to adapt mediæval ideas, legal and political, to the needs of the modern state. But necessarily the manner in which this adaptation was effected in different states depended upon the legal past of each particular state; and since England's legal past differed from that of any other European state, the manner in which the transition from mediæval to modern was effected was fundamentally different. Taking a broad view of the various states of Western Europe, we have seen that,[1] apart from the Latin races, they fell into two main categories. Into one category fell those states whose legal systems had already been partially Romanized. Since their law and institutions could be readily adapted to modern needs by a further application of rules and ideas already received, the Reception took the form of a development. Into the other category fell those states whose legal systems consisted of a collection of archaic customary rules, quite unaffected by any foreign influence. Since their law and institutions were quite incapable of adaptation to modern needs by any process of development, the Reception took the form of a revolution. But England and English law cannot be brought under either of these categories. England had experienced a Reception in the twelfth and thirteenth centuries;[2] but the direct influence of Roman on English law had ceased at the end of the thirteenth century.[3] There could, therefore, be no Reception by way of development; and a Reception by way of revolution was both unnecessary and practically impossible.

It was unnecessary because the rules of the common law were no mere collection of archaic customs. They were a logical system of fundamentally reasonable rules professionally taught. They suffered no doubt from the effects of an excessive technicality and formalism; but they had already shown themselves to be capable of expansion to meet new needs. And if we admit, as we may well do, that the mediæval common law was a system as learned and as reasonable as the system of the Bartolists we might maintain the seeming paradox that if a wholesale and revolutionary Reception had taken

[1] Above 247-250.
[2] Vol. ii 145-149, 174-178, 202-206, 267-286.
[3] Ibid 287-288.

place in England in the sixteenth century, it would have been a unique phenomenon. It would have been the one case in which a system of law professionally developed and professionally taught in the Middle Ages had been wholly set aside.

A revolutionary Reception was practically impossible because the principles of the common law were part and parcel of the English constitution. To supersede the common law by Roman rules it would have been necessary to sweep away, or at least to modify profoundly, the existing machinery of government; and this, as we have seen, was wholly contrary to the methods, and, indeed, beyond the powers of the Tudor kings. On the other hand, it is clear that some additions to the existing legal system were needed to enable English law to satisfy the exigencies of this new age. This need was met in two ways:—

(1) Writers and judges turned to Glanvil, Bracton, Britton, and Fleta—to the law books which the legal Renaissance of the thirteenth century had inspired. They turned to these books rather than to the books of the Glossators, the Bartolists, or the Renaissance jurists, because the former were familiar to them, and because they could find there rules and principles, already half naturalized, which were fitted to their needs. But for these books Coke's Institutes could not have been written. The general principles which they had taken from Roman law, and adapted more or less to English uses, were brought to light; and in the course of this and the following century they were gradually made integral parts of the fabric of English law. Nor is this reversion to the thirteenth century wholly peculiar to England and to English lawyers. It is well to remember that the great Cujas deliberately stated that the work of Accursius was more helpful to the student than the works of the Bartolists.[1] The common law was thus liberalized by a Reception—but it was a Reception which was marked by the same intensely national character as marked the Reformation, the Renaissance, and the constitutional changes of this century. In the following century the fact that the Reception had taken this form proved to be the strongest security for the maintenance of constitutional government.

(2) New courts and councils administering rival or supplementary bodies of law were either newly created or developed from existing institutions. We have seen that some of these courts administered the civil law; and that others, though they owed something to the civil or canon law, accepted and took as their starting-point many of the general principles of the common law.[2] In this way new blood was introduced into the English

[1] Flach, Cujas, Les Glossateurs et les Bartolistes 5-15; cp. Gravina, De ortu et progressu Juris Civilis 109.

[2] Above 238, 274-275, 280-282.

legal system; but it was introduced in such a way that the machinery and principles of the common law remained intact. In the sphere of legal development, as in the sphere of political and religious development, the new was placed side by side with the old; but no attempt was made to supersede the old by the new. And just as the peculiar character of the political and religious settlement effected by the Tudors is the main cause of the peculiar characteristics of the English constitution and the English church, so the peculiar character of their legal settlement is the main cause of one of the most remarkable peculiarities of English law—the fact that it is composed of very diverse systems, based to some extent on wholly different principles. This is a peculiarity which it still to some extent retains; for though the diverse systems of which it consists are now for the most part administered by one Supreme Court of Judicature, their fundamental diversity makes it necessary "for the convenience of business" that there should be divisions in that court.

In the mediæval period the absence of an authoritative text gave rise to one of the most distinctive features of English law—the system of case law.[1] In this period the combined toughness and elasticity of the system so created thus gave rise to another of its most distinctive features. The result is that English law differs from the law of those countries in which Roman law was received, whether by way of development or by way of revolution, in that it consists, not of one uniform system arranged more or less according to the subject-matter of its various parts, but of several disparate systems; and among those systems a defined, if modest, place was, as we have seen, assigned to the civil law itself.[2] The toughness of the common law has in fact effected for the English system what the toughness of the old Roman *jus civile* effected for the classical Roman system—a development by means of a multiplication of parallel legal rules. But in the English system the division has been more permanent because the multiplication has been not of legal rules only, but also of tribunals administering those legal rules by means of distinct codes of procedure.[3] Our Judicature Acts did not attempt to do for the English system what Justinian's codification did for the Roman. For this result we must wait patiently till the case law of the Supreme Court, codifying Acts, and a uniform code of

[1] Vol. ii 243-244, 541-542; above 221-222, 225.

[2] Above 238.

[3] Vol. i 635; it is interesting to observe that the administrative law of continental states, because it has been developed in tribunals distinct from those which administer the ordinary law, exhibits the same sort of separation as exists in this country between common law, equity, and admiralty law: see Dicey, Law of the Constitution (7th ed.) 327 n. 1, citing Tocqueville, Œuvres complètes vii 67, 68.

procedure have had time to do the necessary preliminary work, accomplished at Rome by the classical jurists of the Empire—the work of consolidating into one whole the various systems of which English law consists.

In the Middle Ages English legal development had fallen apart from the legal development of the continent. Largely as a result of its peculiar mediæval development it falls still further apart in this age of the Reception. But notwithstanding this we can see in two respects a historical parallelism. (1) Just as the political speculations of the Bartolist lawyers influenced the continental political theories of this period,[1] so the political ideas contained in the common law became the constitutional law of the English state and formed the political theory of Englishmen,[2]—a theory received by foreign nations during the last century even more widely than the rules of Roman law were received in the sixteenth century. (2) On the continent, in spite of the classical school of Renaissance jurists, the practical law which the sixteenth century received was dominated by the Bartolist tradition, by the system, that is, which had grown up in the Middle Ages.[3] So in England the supplementary and rival bodies of law which grew up during this period were to a large extent dominated by the rules and conceptions of a common law, the main outstanding features of which had been fixed during the same mediæval period. And this continuous attachment both of English and continental lawyers to mediæval modes of thought is quite intelligible. The exigencies of their art compelled the lawyers to gravitate to the older intellectual order. For, though it may be that the English system of, case law has greater affinities to the newer intellectual order because it is more inductive than the continental system, which depends upon authoritative treatises,[4] legal rules in both systems must depend upon authority of some kind; and they must be developed by deductive processes. To the Renaissance scholars, and to the student of the natural sciences, whose claims and hopes were voiced by Bacon, "Veritas . . . a lumine naturæ et experientiæ quod æternum est petenda est:"[5] to Coke and the common lawyers the "duo lumina mundi" were "auctoritas et ratio."[6]

[1] Above 191-192; vol. vi c. 6.

[2] Above 200-215; vol. vi c. 6.

[3] Above 227-228.

[4] J. C. Gray, The Nature and Sources of the Law 256, 257, "The method of the Common Law is the more scientific, and it would be entirely so, were it not that it gives an artificial weight to prior decisions by assuming them to be correct. The Common Law judge is like an experimenter in chemistry, who is always testing his theory by new and varied experiments, but who is not ready enough to admit that the record of former experiments may be wrong; while the Civil Law judge, on the other hand, having arrived at a theory, insists on applying it as the true rule of nature;" cp. Pollock, Essays in Jurisprudence and Ethics 237-260.

[5] Nov. Org. lvi (Works i 170).

[6] Fourth Instit. 320.

We are now in a position to sum up briefly the consequences of the Reception both on the Continent and in England.

The Consequences of the Reception on the Continent and in England

"Three times," says Ihering,[1] "has Rome dictated law to the world, three times has she been a bond of union between peoples; first through the unity of the state when the Roman people were at the height of their power; then through the unity of the Church after the fall of the Roman Empire; and for the third time through the unity of law in consequence of the Reception of the Roman law of the Middle Age. . . . The Roman law has become, like Christianity, an element in the civilization of the modern world." It was, as we have seen, during the centuries of the Middle Age that this third conquest was being prepared by the civilians and canonists who were adapting Roman law to the legal and political needs of the modern state.[2] As a consequence of their work the various European states have acquired a number of fundamental legal principles which are common to all, and a science of law has been thereby rendered possible.[3] England, it is true, retained her common law; but that common law was, like the Roman law which the sixteenth century received, formed amidst mediæval ideas, and it was supplemented by rules and principles, the addition of which was due to the same causes as those which had brought about the continental Reception. Though, therefore, English law was fundamentally unlike that of the continent, it was sufficiently akin to render possible a science of comparative law. From the point of view of legal theory this is the most important and the most general consequence of the Reception. At some of its other consequences I have already glanced; and they can therefore be summarized very briefly.

In the first place it is the note of universality which can be discovered in the civil and canon law that has made it possible to express in legal form the many various relations which exist between the states of modern Europe. Theories of a natural law, a *jus divinum*, or a *jus gentium*, which the mediæval civilians and canonists had elaborated from the Roman jurisconsults, from classical philosophy, and from Christian doctrine,[4] replaced the theory

[1] Geist des Römischen Rechts (tr. by Meulenare) i 1, 3. [2] Above 241-243.

[3] Ihering, op. cit. 10, "Les linéaments des droits isolés cessent de se côtoyer sans se toucher; ils se croisent, ils se réunissent en un seul tissu, dont le droit romain et le droit canon constituent la trame originaire commune. . . . La pensée du jurisconsulte de l'Espagne épargnait au savant de l'Allemagne de grands efforts, le Hollandais continuait l'édifice commencé par le Français: la pratique des tribunaux italiens exerçait une influence déterminante sur la jurisprudence des tribunaux de tous les autres pays."

[4] Gierke, Political Theories of the Middle Age (Maitland's tr.) 74-76; vol. v 27.

of the Holy Roman Empire as the basis of international intercourse —even as in later days these theories of natural law have given place to a modern International law resting upon positive acts and long-continued usage. England played a distinguished part in the origination of this new body of law. Grotius's great predecessor, Albericus Gentili—an Oxford professor and a man learned "in all the traditional legal lore of Italy"[1]—has some claims to be its founder; and Richard Zouche, another Oxford professor, helped to originate its name.[2]

In the second place, it has affected the course and tone of political discussion in the modern world. Though in practice the Reception led to absolutism, the form in which the Roman law was received kept alive legal theories and conceptions which sooner or later have supplied an antidote. Many political and moral questions as to the relationship between church and state, and as to their constitution or their government, had been discussed by the canonists and civilians as problems of divine or human law. In the works of Bartolus and his school could be found, as we have seen,[3] a well-stocked arsenal of theories, legal and political, suited to the needs of the publicists who, in the sixteenth and seventeenth centuries, wished to attack or support authority in church or state. They could make use of such concepts as "the feudal superiority of God over king, the theory of the contract between God and king and between people and king, the loss of dominion from lack of grace, the right of resistance on breach of contract;" and these "were all part of the heritage of previous ages, the philosophical residuums of previous political contests."[4] Thus the political theories of the Middle Ages were brought from the schools by the religious and political conflicts of the Reformation, and applied to the needs of the modern state.[5] But the legal form, which had been given to the discussion of these questions by the mediæval lawyers, was received along with their theories by the writers of the sixteenth and seventeenth centuries, and became a distinguishing characteristic of the political science of modern Europe.[6] It has led those who have wished to resist or support a government, to claim a larger liberty for the individual, or extended powers for the state, to appeal, not to morals or expediency, but to such legal conceptions as an original contract, or a right natural or divine;[7] and this at bottom is based

[1] Holland, Studies in International Law 58; vol. v 52-55.
[2] Holland, op. cit. 1; vol. v 17-20, 58-60. [3] Above 21-22, 223.
[4] Armstrong, The Political Theory of the Huguenots, E.H.R. iv 34.
[5] Brissaud, op. cit. 968, "Les théories politiques du moyen âge, très hardies parfois, restaient enfermées dans les écoles; il fallait la révolution réligieuse du seizième siècle pour leur donner accès dans le monde des faits."
[6] Figgis, R.H.S. Tr. (N.S.) xix 148, 149; From Gerson to Grotius 166.
[7] Figgis, R.H.S. Tr. (N.S.) xix 151, 152; and cp. the same writer in Camb. Mod. Hist. iii 762, 763.

on the mediæval idea of the theoretical supremacy of right.[1] England has felt influences historically analogous in kind, but in substance very different. The political and legal theories of Englishmen were founded on mediæval ideas; but they were the mediæval ideas of the common law, and not of the Bartolists. It is not till the seventeenth century that continental theories influenced English political thought; and their influence was never strong enough to leave any very permanent traces in the theory or phrasing of legal rules.

Finally, it is the application of these principles of the civil and canon law to the legal needs of the modern state which has, sooner or later, given to the nations of Europe the desire for a national law, and the technical skill and knowledge needed for its production. How soon this desire for a national law was awakened depended upon the political history of the nation. Where national feeling was strong, the desire awakened early. In France in the sixteenth century, for instance, Pasquier[2] and Hotman[3] lamented the dependence of French law on the civil law; Pasquier thought that if a doubtful point arose, the lawyers should have recourse, not to Roman law, but to the various native codes of customary law;[4] and Hotman advocated the codification of French law.[5] In Holland, at the beginning of the seventeenth century, the genius of Grotius laid the foundations of the national system of Roman Dutch law. His Introduction to Roman Dutch law systematized so skilfully the mass of local customs and Roman rules that, "If we had lost all the subsequent works on Roman Dutch law, and had retained only the Introduction of Hugo de Groot, we could administer to-day the Roman Dutch law very much in the same way as it is actually interpreted by our courts."[6] In Germany, on the other hand, the growth of national feeling was far slower.

[1] Stubbs, Lectures on Mediæval and Modern History 239 seqq.; vol. ii 131-132.

[2] Les Lettres de Pasquier, Bk. ix no. 1, "Il est desormais temps qu'ostions ceste folle apprehension qui occupe nos esprits, par laquelle mettons sous pied ce qui est du vray et naif droit de la France, reduisons tous nos jugemens aux jugemens des Romains. . . . C'est grandement errer de vouloir, devant la face de nos juges, confirmer ou infirmer indistinctement le droit de nostre France par celuy des Romains."

[3] Anti-Tribonian, passim; the title of the book runs as follows: "In quo iurisprudentiæ Tribonianæ sterilitas et legum patriarum excellentia exhibetur."

[4] Les Lettres de Pasquier, Bk. ix no. 1, "Quelle raison y a t'il de l'aller plustost mendier à Rome qu'aux Coustumes circonvoisines?"

[5] Anti-Tribonian 139 (ed. 1681) "Seroit fort aisé . . . d'assembler un nombre de jurisconsultes, ensembles quelques hommes d'estat, et autant plus notables advocats et practiciens de ce Royaume, et à iceux donner charge de rapporter ensemblement ce qu'ils auroient advisé et extrait, tant des livres de Justinien que des livres de Philosophie; et finalement de l'experience qu'ils auroient acquise au maniement des affaires;" cp. Œuvres de Pasquier (ed. 1723) ii 582; and Baron, Franz Hotman's Anti-Tribonian, cited Maitland, English Law and the Renaissance 76.

[6] J. W. Wessels, History of the Roman Dutch Law 279; cp. ibid 276, "No jurist before Grotius regarded the law of the Netherlands as a system, but treated it either in an unmethodical and unsystematic way as a confused mass of laws and customs, or else it was dealt with incidentally, in works on Roman law."

The works on the *usus modernus Pandectarum*, in which the German lawyers of the last half of the seventeenth century stated the law of Germany, assumed the authority of all those parts of the *corpus juris civilis* which were not clearly obsolete.[1] But Germany also in these last years has attained its Bürgerliches Gesetzbuch—"the most carefully considered statement of a nation's law that the world has ever seen."[2] These national codes, whether they came early or late, were in all cases necessarily based in a greater or smaller degree on the principles of Roman law, which had been received in this century; and it is in this respect that the legal development of England differs most conspicuously from that of the continent. Just as the mediæval common law has coloured the political ideas of later centuries, so it has coloured even more markedly the whole fabric of English law. It is true that we may trace continental influences in the maritime and commercial law administered in the Court of Admiralty; it is true that continental ideas strengthened the hands of the government in its work of restoring the supremacy of the law, by encouraging the growth of a supplementary or a rival system of civil and criminal equity administered in the Chancery and the Star Chamber; it is true that these same ideas both inspired the common lawyers with the desire to improve their own system, and gave them valuable hints as to the form which those improvements should take. But, in spite of rival courts and foreign influences, the mediæval common law stood its ground. England did not need the discipline of a Roman code to learn the desire for a national law; and her lawyers, as Wycliffe had long ago remarked,[3] had as much technical skill and knowledge as their Roman rivals.

It would not be true to say that English law, either in this or any other period of our legal history, owes nothing to Roman law; but it would be true to say that English law has been fortunate in its contact with Roman law. At different periods in English history the development of our law has been materially helped by this contact. In the age of Bracton, Roman law taught the fathers of the common law the way to construct an intelligible legal system. In the sixteenth century it helped to make English law sufficient for the needs of a modern state. In the eighteenth century it helped Lord Mansfield to found our modern system of mercantile law. It was the sixteenth century that was the critical

[1] Grueber, Introd. to Sohm, Institutes of Roman Law xxii-xxiv.

[2] Maitland, Political Theories of the Middle Age xvii.

[3] De Officio Regis 193, 194, "Sed non credo quod plus viget in Romana civilitate subtilitas racionis sive justiciæ quam in civilitate Anglicana . . . patet quod non pocius est homo clericus sive philosophus in quantum est doctor civilitatis Romanæ quam in quantum est justiciarius juris Angliæ;" cp. L.Q.R. xii 76.

period. For the first and only time in its history the supremacy of the common law was threatened; and its supremacy was not fully secured till the legislation of the Long Parliament.[1] That it was able to assert its supremacy is due partly to the earlier Reception of the thirteenth century, partly to its capacity to assimilate principles borrowed from its rivals—principles which, in many cases, can be connected directly or indirectly with the Reception of this century.

We have received Roman law; but we have received it in small homœopathic doses, at different periods, and as and when required. It has acted as a tonic to our native legal system, and not as a drug or a poison. When received it has never been continuously developed on Roman lines. It has been naturalized and assimilated; and with its assistance, our wholly independent system has, like the Roman law itself, been gradually and continuously built up, by the development of old and the creation of new rules to meet the needs of a changing civilization and an expanding empire.

But we must now return to the English law of the sixteenth and early seventeenth centuries, and examine the gradual evolution of its modern machinery, principles, and rules from their mediæval bases.

[1] Sir Henry Martin, the judge of the Admiralty, recognized that the Long Parliament was likely to prove "the funeral of his profession," S.P. Dom. (1640-1641) 197 ccccIxx no. 67.

CHAPTER II

ENGLISH LAW IN THE SIXTEENTH AND EARLY SEVENTEENTH CENTURIES

The Enacted Law

THE series of changes in and developments of English law, which necessarily accompanied the rise of the modern English State, were carried out partly by direct legislative action, and partly by the action of the lawyers and the courts. The direct action of the legislature is most marked in the sphere of public or semi-public law. The large changes involved in the new religious settlement, some of the changes in the judicial machinery of the state, many of the changes in and developments of the criminal law, and most of the changes in the system of local government were made by statute. Both by statute and by proclamation new remedies were devised, or old remedies were adapted to meet the difficulties resulting from the new political, social, and economic conditions of the age; and in many of these statutes and proclamations we can see the origins of some very important branches of modern law, such as the usury laws, the patent laws, the law as to copyright, and the law of employer and workmen. The only statutes of first-rate importance which made radical changes in existing departments of purely private law were the statutes of Uses and of Wills. We shall see that it was the effect upon public law of the popularity of the Use that was the principal cause of the enactment of the former statute; and that the enactment of the latter was caused directly by the effects of the former, and indirectly by the political and economic changes which strengthened and accelerated the existing tendency to eliminate feudal ideas, and to make land ownership merely a branch of property law.

The detailed working out of these direct legislative changes was left partly to the action of the Council, but chiefly to the action of the lawyers and the courts. It was by the action of the lawyers and the courts that the principles of many parts of the modern land law and the criminal law were finally settled; and the beginnings of the system of equity and of mercantile law, and

the development of the modern law of contract and tort were due wholly to it. All the courts new and old had a share in this work. The new courts and councils of this period introduced many new ideas and principles both into substantive and adjective law; and the common law was both modified and developed by its contact with these rival institutions.

In this century, therefore, as in the two preceding centuries, the story of the development of English law falls into two well-marked divisions. There is, in the first place, the development resulting from the direct action of the legislature, and, in the second place, there is the development resulting from the action of the lawyers and the courts. But in this period the latter development is more complex than it was in the preceding period. We must consider not only the developments which were taking place within the sphere of common law jurisdiction, but also those which were taking place outside that sphere. We must therefore adopt a threefold division. In the first place we must deal with developments due to direct legislative action; in the second place with developments due to the action of courts outside the sphere of the common law; and in the third place with developments due to the action of the common law courts. The first of these topics is the subject of this chapter, and the second and third are the subjects of the three following chapters.

During this period direct legislative action might take the form either of a statute or a proclamation. But of these two forms the statutes are by far the more important. All the great permanent changes in and additions to the law were made by statute—in fact we have seen[1] that it was doubtful whether a proclamation did not lose its force at the death of the sovereign who had issued it. It might therefore seem that the legal historian could safely neglect the proclamations of this period. But for two reasons this is not the case. In the first place, during the greater part of this period, the sphere within which proclamations had the force of law was, like many other points of public law, doubtful. A good deal more was done by proclamation than could be attempted after the Great Rebellion. In the second place, the proclamations, though of far less importance than the statutes, often afford indications of the general trend of legislation, and illustrations of the manner in which the law—statutory or otherwise—was applied in practice. Therefore by way of introduction to my treatment of the statutes I shall say a few words about the contents of some of the proclamations of this period.

[1] Above 100.

THE PROCLAMATIONS

We have seen that Henry VIII.'s short-lived Statute of Proclamations was intended to define the sphere within which proclamations should have the force of law, and the forms under which they should be issued.[1] The extant list of proclamations would seem to show that neither the enactment of this statute nor its repeal at the beginning of Edward VI.'s reign had any great effect upon either of these matters. The passing of this statute may have been a very remarkable constitutional phenomenon; but a reading of the Tudor proclamations gives us no hint of its appearance. Though, as I have said, some of these proclamations overstep the sphere assigned to them by our later constitutional law, their number is relatively small; and they are found rather at the end of the Tudor period (long after Henry VIII.'s statute had been repealed) than during the few years when it was in force. As a matter of fact the Tudors made so tactful a use of their powers in this respect that no urgent demand for a stricter definition arose.

The clear-cut theories of the first Stuart king as to the extent of his powers,[2] and the attempts which he made to carry his theories into execution,[3] brought this, as well as other questions of public law, to the front. In 1610 the Commons complained that "proclamations have been of late years much more frequent than heretofore, and that they are extended not only to the liberty, but also to the goods inheritances and livelihood of men . . . by reason whereof there is a general fear conceived . . . that proclamations will by degrees grow up and increase to the strength and nature of laws."[4] Coke was consulted as to the answer to be given in this remonstrance; and his answer, contained in the *Case of Proclamations*, permanently settled the sphere within which they were operative.[5] He laid it down that "the King cannot change any part of the common law nor create any offence by his proclamation which was not an offence before, without Parliament;"

[1] Above 102-103. [2] Vol. vi c. 6. [3] Ibid c. 6.

[4] Petition of the House of Commons July 7 1610, printed in Prothero, Documents 305-306—"Some of them," it is said, "tending to alter some points of the law and make them new: other some made shortly after a session of parliament for matter directly rejected in the same session: others appointing punishment to be inflicted before lawful trial and conviction: some containing penalties in form of penal statutes: some referring the punishment of offenders to the courts of arbitrary discretion, which have laid heavy and grievous censures upon the delinquents: some, as the proclamation for starch, accompanied with letters commanding enquiry to be made against the transgressors at quarter sessions: . . . and some vouching former proclamations to countenance and warrant the latter."

[5] The Case of Proclamations (1611) 12 Co. Rep. 74—the proclamations as to new buildings in London, below 303, and as to making starch from wheat, below 302, were those which Coke was specially directed to consider.

nor would the prohibition of an act by proclamation make an offence punishable in the Star Chamber, if it was not already punishable there. "But a thing which is punishable by the law, by fine and imprisonment, if the King prohibit it by his proclamation . . . and so warn his subjects of the peril of it . . . this as a circumstance aggravates the offence."

It was not till after the Great Rebellion that these principles were recognized by all parties as finally settling the law upon this point.[1] Throughout this period we meet with proclamations which not only carry into effect existing law but also make new law. Therefore, as I have said, during this period the proclamations have an importance for the legal historian which they have at no subsequent period. I shall describe some of them under the following heads: (i) The administration of the government; (ii) matters religious; (iii) commercial and industrial regulations; (iv) social life; (v) the press; (vi) miscellaneous.

(i) *The administration of the government.*

The proclamations which deal with administration form the largest group. I shall take one or two examples from some of the leading topics falling under this head.

In the first place all matters connected with the coinage were dealt with by proclamation. Numerous proclamations determined from time to time what coins should be legal tender;[2] and announcements were made of new issues,[3] and the rates at which they were to be received. Sometimes certain foreign coins were allowed to pass current, and the rates at which English could be changed for foreign coins were fixed.[4] Thus James I. fixed the rates at which Scotch coins were to be current in England;[5] and Charles I. allowed the French coin, in which the Queen's dowry was remitted, to pass current, as, owing to the plague, it could not be reminted.[6] Sometimes warning was given that foreign coin was only to be reckoned as bullion.[7] The import of base coin, and the export of English currency was forbidden.[8] Light coins were called in.[9] The coinage was depreciated or enhanced in

[1] Vol. vi c. 6.

[2] Tudor and Stuart Proclamations i nos. 28 (1497); 36 (1498-1499); 46 (1504); 49a-51 (1505); 82 (1522); 343-344 (1548-1549); 408 (1552); 428 (1553); 448 (1553-1554); 458 (1554); 530 (1560).

[3] Ibid nos. 1005 (1604); 1488 (1626).

[4] Ibid nos. 8a (1488); 88 (1522).

[5] Ibid no. 940 (1603).

[6] Ibid no. 1447 (1625).

[7] Ibid nos. 610, 614 (1565).

[8] Import, ibid nos. 17 (1491); 30 (1497-1498); 34 (1498-1499); 469 (1536). Export, ibid nos. 127 (1531); 348 (1549); 399 (1551); 468 (1556); 531 (1560); 1043 (1607); 1157 (1614-1615).

[9] Ibid nos. 326 (1547-1548); 467 (1556); 794 (1587); 1129 (1613); 1269 (1619-1620); 1512 (1627).

value.[1] Punishment was threatened for the circulation of malicious rumours as to the government's intentions with regard to the coinage.[2] One of the last of Elizabeth's proclamations tells us of an ingenious means of meeting the need for a smaller coin than pence or three-farthing pieces. Tradesmen issued tokens of tin and lead available only at their own shops. The proclamation suppressed this practice.[3] But in James I.'s reign the utility of such tokens was recognized. A patent was issued to Lord Harington to make them; and other issues were prohibited.[4] But the prohibition was not effectual; and the issue brought no profit to those who tried to work the patent. We shall see that it almost ruined Malynes, an official of the mint, and the writer of the earliest English treatise upon the Law Merchant.[5]

In the second place the proclamations dealt with all matters relating to foreign affairs. We get a proclamation announcing a declaration of war,[6] and another permitting the fitting out of privateers.[7] The countries with which English merchants were allowed to trade were published by this means,[8] aliens were banished,[9] and orders were given to prevent suspected persons leaving the country.[10] We can see the beginnings of a law of neutrality in an order to English sailors not to accompany Scotch expeditions against the Portuguese, and not to commit piracy under cover of old letters of reprisal,[11] in a prohibition against enlisting with foreign princes;[12] and in a list of articles which were to be accounted contraband.[13] The curtailment by proclamation of the right of aliens to fish in English waters[14] was the occasion for the beginning of a long controversy which is immortalized in the opposing works of Grotius and Selden.[15] At this period the regulation of the customs was an important branch of foreign affairs; and readjustments of the tariff in the interests of trade were made in this way.[16]

[1] Tudor and Stuart Proclamations i nos. 396-397, 400 (1551); 406 (1551-1552); 541 (1560-1561); 544 (1561); 559 (1561-1562); 1254 (1619).
[2] Ibid nos. 536 (1560-1561); 560 (1561-1562). [3] Ibid no. 932 (1602-1603).
[4] Ibid nos. 1128 (1613); 1145 (1614); 1195 (1616-1617); 1432 (1625); 1717 (1635-1636).
[5] Vol. v 132.
[6] Tudor and Stuart Proclamations i no. 66 (1513).
[7] Ibid nos. 475 (1557); 1463 (1625).
[8] Ibid nos. 605 (1564)—restoring intercourse with the Low Countries; 632 (1568-1569)—forbidding traffic with Spain on account of the seizure by Alva of the goods of English merchants; 686 (1572)—terms on which intercourse is to be allowed between England and Spain.
[9] Ibid no. 445 (1553-1554).
[10] Ibid nos. 38, 39 (1499)—in consequence of the flight of Edmund de la Pole.
[11] Ibid nos. 547 (1561); 972 (1603); 1070 (1608-1609).
[12] Ibid nos. 698 (1575); 1010 (1604-1605); 1014 (1605).
[13] Ibid no. 1506 (1626). [14] Ibid no. 1077 (1609). [15] Vol. v 10-11.
[16] Tudor and Stuart Proclamations i nos. 20a (1490)—Venetians must pay the same duties on Malmsey as English merchants pay at Venice; 62 (1511)—prohibition

In the third place we have a number of proclamations concerning the army and the navy. They dealt with offences committed by soldiers and sailors,[1] such as desertion[2] or mutiny,[3] with the embezzlement of stores,[4] with the enrolment and mustering of men for national defence.[5] One shows us that in 1588, soldiers were pressed for foreign service.[6] Proclamations relating to the efficiency of the army dealt with the supply of horses,[7] gunpowder[8] (for the manufacture of which the crown possessed large privileges),[9] and the manufacture of arms.[10]

In the fourth place many proclamations publish and enforce the existing statutes,[11] and warn officials and others to do their duty and obey the law.[12]

(ii) *Matters religious.*

In the earlier part of this period there are a very large number of proclamations upon this topic. We can trace in them the various stages in the history of the Reformation, the settlement of the English Church, and its struggle against sectaries of all kinds.

One of the earliest of Henry VIII.'s proclamations was, "for resysting and withstandying of most dampnable Heresyes soever within this realme of the disciples of Luther and other Heretykes peruerters of Christe's relygion".[13] This was published in 1528-1529; and it was followed up by another in the following year prohibiting certain heretical books, and also the translated bible.[14]

of the import of Gascon wine; 178 (1538-1539)—for seven years additional duties payable by aliens are remitted; below 336-338.

[1] Tudor and Stuart Proclamations i nos. 7a (1487); 817 (1589); 1526 (1627); 1797 (1638-1639).

[2] Ibid nos. 267 (1544-1555); 482 (1558).

[3] Ibid nos. 1821, 1822 (1640).

[4] Ibid no. 1461 (1625).

[5] Ibid nos. 12 (1489); 26, 27 (1497); 63 (1512-1513); 83, 84 (1522); 269 (1545); 1496 (1626).

[6] Ibid no. 809 (1588-1589).

[7] Ibid no. 567 (1562)—an elaborate proclamation reciting the provisions of all the statutes in force relating to the obligations of certain landowners to keep horses and not to sell or export them; cf. nos. 347 (1549); 415, 416 (1552); 611 (1565); 746 (1580); 1064 (1608); below 330.

[8] Ibid nos. 1346 (1622-1623); 1391 (1624); 1418 (1625).

[9] The King's Prerogative in case of Saltpetre (1607) 12 Co. Rep. 12; below 331, 352.

[10] Tudor and Stuart Proclamations i no. 1635 (1630-1631)—a commission granted to a company to manufacture and to stamp all arms and armour; none not so stamped to be sold.

[11] Ibid nos. 56 (1511)—the statute of Winchester and the statutes as to the price of victuals; 70 (1514); 663 (1571-1572); 758 (1583)—Liveries and retainers; 74 (1516-1517)—statutes of Winchester and statutes dealing with apparel, vagabonds, and labourers; 100 (1526)—transporting hawks and shooting with cross bows and hand guns.

[12] Ibid nos. 9 (1488); 459 (1555); 513 (1559); 1033 (1606); cf. no. 329 (1548)—an order to the judges and justices of the peace to appear in the Star Chamber.

[13] Ibid no. 114.

[14] Ibid no. 122.

Henry's views as to what constituted heresy varied as his reign proceeded; and the progress of his views can be seen in the proclamations as to the ceremonies and the books which he allowed or prohibited. In 1535 the nation was warned that Parliament had abolished the usurped power of the Pope, and made the king supreme head of the church. The bishops and the clergy were therefore ordered to preach concerning the doctrine of the royal supremacy, and schoolmasters were ordered to instruct the children under their charge as to its meaning.[1] In 1535-1536 it was recited that a sermon of the late bishop of Rochester and other objectionable books were dispersed throughout the realm, their owners were warned that they must deliver them up, and mayors and other officials were ordered to search for them.[2] In 1537,[3] and 1538-1539,[4] proclamations were issued containing, among other things, a list of ceremonies allowed, and directing the clergy to instruct their congregations in their meaning. In 1539[5] certain ceremonies were denounced, preaching was restricted, and a warning was given against misinterpretation of the Scriptures. In 1541 the Feast days still allowed were enumerated;[6] and in the same year, curates and parishioners were ordered to obey the royal injunction, and set up a bible in every church.[7] The rapidity with which the Reformation was pushed forward in Edward VI.'s reign resulted in a growing disregard, not only for the laws as to religion, but also for the rules of morality. It appears that the sacrament was irreverently discussed,[8] that curates, preachers and laymen introduced new rites and ceremonies into their churches,[9] that wandering preachers travelled up and down the country circulating false rumours and false doctrines,[10] and that it was being said that bigamy and divorce were lawful. We get also a number of proclamations as to the observance of the "political Lent," established for the benefit of the fish trade.[11] Mary's reign opens with a very politic proclamation to the effect that, though the queen will maintain her own religion, she will not enforce others to conform to it till order is taken by common consent.[12] But later there is an announcement that Henry IV.'s statute against heresy is revived, and a long list of prohibited books is set out, among which figures the

[1] Tudor and Stuart Proclamations i no. 153 (1535).
[2] Ibid no. 155 (1535-1536).
[3] Ibid no. 176.
[4] Ibid no. 177.
[5] Ibid no. 180.
[6] Ibid no. 195.
[7] Ibid no. 192.
[8] Ibid no. 320 (1547).
[9] Ibid no. 323 (1547-1548).
[10] Ibid no. 327 (1548).
[11] Ibid nos. 321 (1547-1548); 392 (1550-1551); 419 (1552-1553); some of Elizabeth's proclamations on this subject are nos. 502, 521, 831, 848; for some of the Stuart proclamations see nos. 1055, 1091, 1106, 1120, 1155, 1265; for the Statutes which regulated it see below 328.
[12] Ibid no. 429 (1553).

prayer book of Edward VI.[1] Elizabeth's reign opens with an order as to the prayers which may be used and the preaching which is permitted.[2] A few months later there is an announcement that Edward VI.'s statute as to the reception of the sacrament is revived, so that communion in both kinds is now lawful.[3] The queen's ecclesiastical policy is illustrated by a proclamation to churchwardens and other church officers as to the use of the services provided in the prayer book,[4] by proclamations directed against various protestant sectaries, including the anabaptists and the family of love,[5] and others directed against Jesuits and seminary priests.[6] We get similar proclamations, but in considerably less numbers, in the reigns of James I. and Charles I.[7]

(iii) *Commercial and industrial regulations.*

This group of proclamations is very large, because, as we shall see,[8] during the whole of this period, all matters relating to external and to internal trade were minutely regulated on somewhat the same principles as those which had governed the regulation of foreign trade in the two preceding centuries.[9]

We get numerous and sometimes elaborate regulations as to the price of corn and other food stuffs;[10] and connected with them are prohibitions of or permissions to export or import or transport grain from one place to another within the realm according to the state of the markets.[11] One of James I.'s proclamations directed the formation of magazines of corn, that prices might be kept up in times of plenty and kept down in times of scarcity.[12] Equally numerous were the denunciations of the forestaller and ingrosser, who were generally assumed to be answerable for either the scarcity or the high prices which might happen to prevail in

[1] Tudor and Stuart Proclamations i no. 461 (1555).
[2] Ibid no. 498 (1558). [3] Ibid no. 503 (1558-1559).
[4] Ibid no. 660 (1571).
[5] Ibid no. 687 (1573)—called forth by Cartwright's Admonition to Parliament; 529 (1560)—anabaptists are to be expelled; 752 (1580)—concerning the new heresy called the Family of Love which teaches, among other things, that it is "lawful to deny their faith to magistrates not of their belief."
[6] Ibid nos. 837, 839 (1591)—a commission to search for seminary priests; 755 (1580-1581)—as to children educated abroad in Roman Catholic seminaries; 763 (1582)—as to libellous pamphlets published by Jesuits.
[7] Ibid nos. 1903 (1610); 1465 (1625-1626)—enforcement of the laws against Papal recusants; 1553, 1556 (1628)—the fines of these recusants are to be spent in providing ships for coast defence; nos. 974 (1603); 982 (1603-1604); 996 (1604)—dealing with the Hampton Court Conference and the orders for conformity issued after it.
[8] Below 314 seqq. [9] Vol. ii 471-472; below 315-326.
[10] Tudor and Stuart Proclamations i nos. 357 (1549); 470 (1556); 884 (1596); 1669 (1633-1634).
[11] E.g. ibid nos. 61 (1512)—Southampton and Portsmouth permitted to export wheat, etc., from certain counties only; 80 (1521-1522)—free export from the Midlands to London; 325 (1548)—licence to export grain; 389 (1550); 676 (1572); 1126 (1612-1613); 1581 (1620)—prohibition of export; below 374-375.
[12] Ibid no. 1365 (1623).

particular districts.[1] Similarly we get regulations as to the prices of wine,[2] sugar,[3] and other commodities,[4] and as to the licensing of ale houses.[5]

All kinds of trades were carefully regulated in the interests both of the consumer and of the public at large.[6] Thus the manufacture of starch from wheat was carefully controlled, as it tended to diminish the food supply;[7] and popular discontent with the products of the company, which had secured a monopoly of the manufacture of soap, produced infringements of the monopoly, and proclamations against them.[8] The wool and cloth trade was carefully watched, and the places at which sales could take place were regulated with a view to securing the interests of the revenue, the manufacturer, and the consumer.[9] The uniformity and honesty of weights and measures were frequently dealt with.[10] The control over foreign trade exercised by chartered companies is illustrated by proclamations which give extensive powers to these companies;[11] and the control over internal trade exercised by the grant of patents of monopoly to new inventors and others is illustrated by the proclamations which define the extent of these privileges.[12] Desire to encourage the English settlements in America is illustrated by proclamations which prohibited the growth of tobacco in England and its import from anywhere else.[13] We can see that the tendency, which had already begun in the latter part of the mediæval period, to take the management of

[1] E.g. Tudor and Stuart Proclamations i nos. 110 (1527); 117-119 (1529); 401 (1551); 558 (1561-1562); 617 (1565-1566); 888 (1596); 898 (1598); 1058 (1608); 1624 (1630); for these offences see below 375-379.

[2] Ibid nos. 144 (1534); 169 (1537); 290 (1545-1546); 678 (1572); 704 (1576).

[3] Ibid no. 228 (1543).

[4] Ibid nos. 1007 (1604-1605)—bread; 1616 (1630)—bricks.

[5] Ibid no. 1233 (1618-1619).

[6] E.g. ibid nos. 992 (1604)—wool packers; 1123 (1612)—silk dyeing; 1151 (1614); 1207 (1617-1618)—alum; 1267 (1619)—brewers' casks; 1775 (1638)—hats; 1209 (1618)—apothecaries; 1289 (1623)—the apothecaries were separated from the grocers and put under the control of the physicians.

[7] Ibid nos. 1046 (1607); 1062 (1608); 1089 (1608-1609); 1095 (1610); 1330 (1622); it was some of these proclamations that (with some others) gave rise to the Case of Proclamations, above 296.

[8] Ibid nos. 1649 (1632); 1668 (1633-1634); 1680 (1634); cf. Gardiner, History of England viii 284.

[9] Tudor and Stuart Proclamations i nos. 438 (1553-1554)—regulation of sales in the interest of the staple; 570 (1562)—to remedy deceits in the winding and folding of wool; 793 (1587)—places for the sale of wool; 824 (1589-1590); 847 (1591-1592) quality of certain cloths; 1165 (1615)—frauds in manufacture; 1197 (1616-1617)—the staple; 1334 (1622)—export prohibited.

[10] Ibid nos. 797 (1587); 800 (1587-1588); 926 (1602); 953, 960 (1603); 1237 (1618-1619); 1728 (1636).

[11] Ibid nos. 1087 (1609)—East India Company; 1160 (1615)—Levant Company; 1597 (1629-1630)—Eastland Company.

[12] E.g. ibid nos. 1260, 1261 (1619-1620); 1314 (1621)—a list of those patents which had been surrendered.

[13] Ibid nos. 1385 (1624); 1398 (1624-1625); 1415 (1625); 1505 (1626-1627); 1509, 1516 (1627); 1629 (1630-1631); 1677 (1634).

commercial matters out of the hands of the older communities and the boroughs, and entrust them to the Council and the justices of the peace, continued to make way with increasing rapidity.[1] The Elizabethan statutes providing for the regulation of wages were enforced by proclamations of the rates prescribed by the justices;[2] and, in the proclamations relating to the agricultural industry, the abuses of enclosures and the withdrawal of land from tillage figure as prominently as in the statute book.[3]

(iv) *Social life.*

Various aspects of the social life of the period are illustrated by these proclamations. Many of them enforce the severe statutes as to vagabonds;[4] and, as we have seen, in the latter part of Elizabeth's reign it was ordered that they should be punished by martial law.[5] The increase in the size of London presented grave problems to those responsible for the maintenance of the peace, and for the health and food supply of the inhabitants. Accordingly we get in this period a series of proclamations directed against new buildings in and about London.[6] It is clear from their frequent repetition that they did not succeed in attaining their object. But some of them were directed to the attainment of a more feasible object—the securing of well-built and sanitary houses. They aimed, in fact, at effecting the same objects as those aimed at in London by Fitz-Alwyne's Assize of 1189,[7] to which, in one of them, reference is made.[8] But these regulations now come from the central government, and not from the local community; and, from this point of view, they can be regarded as the connecting link between the mediæval borough ordinance and the modern building Act.

The increase in the size of London to which these proclamations bear witness was no doubt partly caused by the fact that the centralized government of this period was making it the

[1] Vol. ii 466-467; above 140, 142; below 321-324.

[2] Tudor and Stuart Proclamations i nos. 574-576 (1563); 654 (1570); 703 (1576); 862 (1593); 875 (1585); below 380-387.

[3] Vol. iii 209-211; below 365-372; Tudor and Stuart Proclamations i nos. 103 (1526); 111 (1528); 333 (1548); 353 (1549); 637 (1568-1569)—these are but a few out of the very numerous proclamations on this subject.

[4] Ibid nos. 121 (1530); 125 (1531); 132 (1533); 273 (1545); 455 (1554); 714 (1576); 971 (1603)—regulations for their transportation; 1623 (1630); see below 394-395 for the statutes on this subject.

[5] Above 101; Tudor and Stuart Proclamations i nos. 818 (1598); 840 (1591); 874 (1595); 899 (1598); 916, 917 (1600-1601); 1188 (1616).

[6] Ibid nos. 969 (1603); 1011 (1604-1605); 1049 (1607); 1063 (1608); 1115 (1611) 1167 (1615); 1218 (1618); 1248 (1618-1619); 1285 (1620); 1340 (1622); 1420 (1625); 1616 (1630); Acts of the Privy Council (1613-1614) 193-194; in 1614 enquiries were ordered as to buildings erected in London since 1603, ibid 589-591, 622-623; on the whole subject see Gardiner, op. cit. viii 287-289.

[7] Vol. ii 391.

[8] No. 1285.

political, the intellectual, and the fashionable centre of England. All who had ambitions of any kind flocked to London and the court. But the government found this concourse undesirable both for political and for sanitary reasons.[1] Partly to secure the efficiency of the local government,[2] partly to stop the constantly recurring epidemics of the plague,[3] frequent proclamations were issued directing the nobility and gentry to leave London and to return to their country seats, and sometimes threatening them with punishment and loss of office in the event of disobedience.[4]

The difficulty of keeping the peace in so crowded a centre as London was becoming was immensely aggravated by the universal practice of carrying arms. In the Tudor period attempts were made to stop the deadly affrays, which were so common a feature in the life of the period, by prohibiting the carrying of certain kinds of arms—such as pistols and hand guns [5]—and by regulating the kinds of weapons which could be bought or carried.[6] James I. made a laudable attempt to stop the practice of duelling.[7] Quarrels accustomed to be settled by this means were for the future to be settled by the Marshal;[8] and, to make this order effective, the carrying of daggers and pistols was forbidden.[9]

Throughout this period the proclamations show us that the mediæval ideas as to the need for separate rules for the various classes of which society was composed were still recognized and enforced.[10] The dress [11] and food [12] of these different classes were still regulated with some minuteness; and games and pastimes, which unprofitably occupied the time needed for military training, were prohibited.[13]

Another prominent feature of our modern social life—the

[1] Hawarde, Les Reports del Cases in Camera Stellata 56, 106, 181-189, 347, 367.
[2] Tudor and Stuart Proclamations i nos. 967 (1603); 1152 (1614); 1177 (1615); 1199 (1617); 1342 (1622); 1647 (1632).
[3] Ibid no. 951 (1603).
[4] Ibid no. 1177 (1615).
[5] Ibid nos. 8 (1487); 701 (1575); 739 (1579); 871 (1594); 1125 (1612-1613).
[6] Ibid no. 472 (1556-1558); 562 (1562); 618 (1565-1566); 745 (1579-1580).
[7] Vol. v 199-201; and see Tudor and Stuart Proclamations i nos. 1134 (1613); 1142, 1143 (1613-1614).
[8] Ibid nos. 1134 (1613); 1636 (1631); for a later attempt to effect the same object by legislation see vol. i 579.
[9] Ibid no. 1184 (1616).
[10] Vol. ii 464-466.
[11] Tudor and Stuart Proclamations i nos. 138 (1533-1534); 515 (1559)—an elaborate proclamation as to the enforcement of the existing statutes; it provides, among other things, that tailors are not to charge too much, and are to make a difference between rich and poor men; 517 (1559)—the dresses of various ranks are elaborately set out; 562 (1562); 717 (1576-1577); 798 (1587-1588); 890 (1597); 1180 (1606).
[12] Ibid no. 75 (1517).
[13] Ibid nos. 101, 113 (1526); 156 (1535-1536); 174 (1536-1537); 669, 673 (1571-1572); 1059, 1060 (1608); 1210 (1618).

Post—begins to emerge in the proclamations of this period. Governmental needs led to the establishment of regular posts between London and Dover, and between London and the North, and other parts of the country;[1] and, when established, they soon became available for all purposes. At the end of the sixteenth century the riders were carrying private letters, and private persons could hire the post horses at a fixed price. In 1584-1585 strangers entering or leaving the country by way of Kent were compelled to hire the post horses.[2] In 1603 it was ordered that every post should enter the date of the despatch and arrival of the government packets, and the names of those by or to whom they were directed.[3] A little later the Crown followed in relation to this new industry the policy which it followed in many other cases.[4] James I. granted to a Postmaster-General a monopoly of carrying letters and packets, and all attempts to infringe this monopoly were suppressed.[5] The result of this new organization was a rapid development of the Post. In 1635 posts were established between London and Edinburgh, London and West Chester and Holyhead, London and Exeter and Plymouth; and it was announced that posts were also to be established beween London and Oxford, Bristol, Colchester and Norwich. No private persons were to compete, but private messages could be sent by known carriers or by a friend.[6] In 1637 an agreement was made, and rates were fixed, for a post between England and France.[7]

(v) *The Press.*

The invention of printing created new problems for the state; and, as we might expect, the control of this new industry was immediately assumed by the crown. A proclamation of 1538[8] prohibited the importation of English books printed abroad, and the printing of any English book, unless the contents had been previously examined by the Privy Council or by some person appointed by it. The publishing of any book of Scripture in English was also prohibited till it had been examined either by the king, by a privy councillor, or a bishop. Many later proclamations ordered the

[1] Tudor and Stuart Proclamations i nos. 492 (1588); 773, 774 (1583-1584); 777 (1584-1585); 881 (1596); 985, 988 (1603).
[2] Ibid no. 777.
[3] Ibid no. 988—"Our packets only to be entered, others to pass as by-letters."
[4] Below 345-347.
[5] Tudor and Stuart Proclamations i no. 1650 (1632); cf. nos. 1078 (1609); 1468 (1625-1626); 1528 (1627-1628).
[6] Ibid no. 1701—the post was to take six days to go from London to Edinburgh and back; the charge was 2d. for under eighty miles, 4d. between 80 and 140 miles, 6d. over 140 miles, and to the Borders and Scotland, 8d.
[7] Ibid no. 1766.
[8] Ibid no. 176.

destruction of heretical or treasonable books, and threatened the printers, publishers, importers, or owners of such books with various penalties.[1] We shall see that the Star Chamber, besides exercising a general jurisdiction in cases of libel and slander,[2] made and enforced the most stringent regulations as to all matters connected with the press; and that it is to these regulations that we must look both for some of the origins of our modern law of copyright, and for the beginnings of the licensing laws. But with the history of these regulations and the origins of these branches of the law I can more conveniently deal in a later chapter.[3]

(vi) *Miscellaneous.*

Among the many Proclamations upon miscellaneous topics two are especially interesting to lawyers, because they prescribe the conditions which persons must satisfy before they could plead before the courts of common law.[4] Two others defined the times of the year at which plays and interludes were to be allowed.[5] Another proclamation of the year 1583[6] (which was apparently not issued) contemplated a reform of the calendar—a project which was destined to wait for its fulfilment for over a century and a half. There are many proclamations—sometimes called briefs—giving permission to make collections for charitable objects of very varied kinds.[7] In 1567[8] we meet with the first appearance of the Lottery as a fiscal expedient. There was to be held, "A very rich Lotterie generall, without any Blancks, contayning a great number of good Prices, aswel of redy Money as of Plate and certaine sorts

[1] Tudor and Stuart Proclamations i nos. 253 (1544); 271 (1545); 295 (1545-1546); 461 (1555); 638 (1568-1569); 656, 659 (1570); 688 (1573); 702 (1576); 770 (1583); 775 (1584); 812 (1588-1589).

[2] Vol. v 205-212.

[3] Vol. vi c. 7.

[4] Tudor and Stuart Proclamations i nos. 293 (1545-1546); 318 (1546-1547); below vol. vi c. 8. There are many proclamations for adjourning the sitting of the courts, often on account of the plague, and sometimes for altering the place where they were to meet, see e.g. ibid nos. 525, 582, 583, 642, 644, 691, 696, 760, 852, 860, 957, 970, 973, 1038, 1434, 1449.

[5] Ibid nos. 365 (1549); 509 (1558-1559).

[6] Ibid no. 769.

[7] For some examples see ibid nos. 76 (1518)—redemption from the Turks; 535 (1560)—endowment for hospital in Wales; 680 (1573)—a hospital at Bath; 692 (1574-1575)—a collection for the repair of Culleton harbour; 726 (1578)—for a harbour at Hastings; 748 (1580)—for Portsmouth on account of damage by fire; 780 (1584-1585)—for building a sea wall at St. Ives; 821 (1589-1590)—to repair a steeple at Selsey which was a seamark for sailors; 879 (1595)—a relief for Penzance, Mousehole, and Newlin which had been sacked by the Queen's enemies; 1185 (1616)—for Stratford-on-Avon which had been damaged by fire; 1211 (1618)—for the relief of the town of Wesell captured by Spinola; 1246 (1619)—to repair Staines Bridge as it is on the highway to the West; 1293, 1294 (1620); 1300, 1305 (1621)—for individuals who had suffered losses by fire; 1530 (1627-1628)—for the Dutch churches of the Palatinate; 1639 (1631)—to redeem Englishmen who are slaves in Barbary.

[8] Ibid no. 624: other proclamations relating to it are 625, 628, 630.

of Merchaundizes, having been valued and priced by the commandement of the Queenes most excellent Majestie, by men expert and skilfull: and the same Lotterie is erected by her Majesties order, to the intent that such commoditie as may chaunce to arrive thereof after the charges borne, may be converted towardes the reparation of the Havens, and strength of the Realme, and towardes such other publique good workes." The growth of the trade and prosperity of the country was marked by a growth in the size and weight of the carts used, and the rise of numbers of hackney carriages. Their appearance created for this period somewhat the same problems as the rise of the modern motor car has created for our own times. But the government, instead of improving the highways, roundly denounced those carts and carriages as nuisances.[1] Their number was restricted,[2] prosecution was threatened if carts were used having more than two wheels, and above a certain weight; and the use of hackney carriages was restricted.[3] The fact that the eleven years of Charles I.'s prerogative rule (1629-1640) was driving Englishmen to the New World is attested by a proclamation of 1637.[4] It recites that many "whose only end is to live as much as they can without the reach of authority" were going to America, and forbids all subsidy men to leave without licence from the Commissioners of Plantations, and all lesser men without a certificate from two justices of having taken the oath of allegiance, and from the minister of conformity to the established church.

We must now turn to the far more important topic of the Statutes, and examine the developments of and the additions to the law effected by them.

THE STATUTES[5]

It was not long after the introduction of printing that collected editions of the statutes, either at large or in an abridged form,

[1] Tudor and Stuart Proclamations i nos. 1216 (1618); 1336 (1622); 1598 (1629-1630); the recitals of a bill introduced into the House of Lords on this subject in 1601 are curious; it is summarized as follows Hist. MSS. Com. 4th Rep. 116: "In consequence of the great increase in the use of coaches, the saddlers trade is like to be ruined, and not only so, but evil disposed persons, who dare not show themselves openly for fear of correction, shadow and securely convey themselves in coaches, and cannot be discerned from persons of honour, besides which, the roads are cloyed and pestered, the horses lamed. In future no one under the degree of a knight or a privy councillor, Queen's counsel, etc., or paying £50 to the subsidy assessment, shall ride or travel in coaches, under penalty of £5 for every offence, and no person shall let coach, or coach horses, to any but those hereby authorized to use them, upon pain of forfeiting the same."

[2] Acts of Privy Council (1613-1614) 238-239.

[3] Tudor and Stuart Proclamations i no. 1713 (1635-1636)—no hackney coach to be used except for a three-mile trip or more; cf. Gardiner, op. cit. viii 291.

[4] Tudor and Stuart Proclamations i no. 1745 (1637).

[5] See the Rec. Comm. Ed. of the Statutes vol. i Introd. xxi-xxiii and App. A.

began to appear; and very soon the statutes, as they were passed, were printed and published by the King's printer—a method of promulgation which, by the end of the fifteenth century,[1] had superseded the mediæval machinery of writs to the sheriffs directing their proclamation and publication.[2] Before dealing with the subject matter of the statutes I shall say a few words about these printed editions of the statutes. In the first place I must say something of the editions of the statutes at large; and in the second place of the abridgments of the statutes.

(1) *The Statutes at Large.*

The earliest edition of the statutes at large was that printed by Machlinia in 1482 or 1483,[3] which contains the Nova Statuta from 1 Edward III. to 22 Edward IV. It was followed in 1497 by an edition printed by Pynson, which contained the statutes from 1 Edward III. up to date.[4] In 1508 the same publisher produced a "Parvus codex qui Antiqua Statuta vocatur," which contained some of the statutes before Edward III.'s reign.[5] These and other editions of the Vetera and Nova Statuta were printed in their original Latin or French or English. In 1534 Ferrers translated Magna Carta and several other statutes;[6] and this translation was the basis of the first complete edition of the statutes which was published by Berthelet in English in 1543.[7] This edition included the statutes from Magna Carta to 1504 (19 Henry VII.). It was succeeded by the following editions: (i) the statutes of Henry VIII.'s and the succeeding reigns published by Berthelet, and later by Powell down to 1575.[8] (ii) "The great Boke of the Statutes," published by Myddlton and Berthelet 1541-1548.[9] This work, the record commissioners say, "appears to have been published at different times and in separate parts;

[1] See the Rec. Comm. Ed. of the Statutes vol. i Introd. xxi-xxiii and App. A.

[2] Vol. i 8; vol. ii 436.

[3] Statutes (Rec. Comm.) i App. A. no. 2; there is a copy in All Souls Library; a few leaves, discovered among the fly leaves of a volume which had been sent to the binders, are in the Bodleian (Inc. c. E 7, 1 (5)).

[4] Ibid no. 7.

[5] Ibid no. 11; reprinted 1514, 1519 and later; there was another edition by Berthelet in 1531, and a second part containing additional statutes by the same publisher in 1532; for the division between the Vetera and Nova Statuta see vol. ii 222-223.

[6] Statutes (Rec. Comm.) i App. A. no. 25; later editions 1540 and 1542.

[7] Ibid xxii; the commissioners say, "It has not been satisfactorily ascertained that any complete chronological series of the statutes from Magna Carta to 1 Ed. III., either in their original language or in English, or that any translation of the statutes from 1 Edw. III. to 1 Hen. VII. had been published previous to this edition by Berthelet. . . . This edition contains some translations, particularly of the *Dictum de Kenilworth*, not included in either of the editions of Ferrers' translations: with respect to others previous to 1 Edw. III. it agrees in general with the second edition of Ferrers' translation;" there is a copy in All Souls Library; the statutes are preceded by a full alphabetical Table of Contents.

[8] Ibid App. A. no. 32.

[9] Ibid no. 33.

and it seems not unlikely that the earliest part may have been published previous to the English edition printed by Berthelet in 1543."[1] In both these editions the printed statutes, as issued by the king's printers, were bound together with the collection of the earlier statutes.[2] (iii) "The whole volume of Statutes at large" published by C. Barker in 1587.[3] Of this edition the commissioners say that it affords the earliest instance of the term "Statutes at Large," and that its version of the statutes previous to 1 Henry VII. agrees in general with Berthelet's edition of 1543.[4]

These editions, for the most part, simply reproduced the texts which had already got into print. There was no attempt to produce a corrected text by comparison with the original MSS. But at the beginning of the seventeenth century, the necessity for such a text began to be felt. This was due partly to the interest awakened in the existing condition of the statute law by the projects for its revision, which were then taking shape;[5] partly to the rise among the lawyers of a critical and scholarly school which was interesting itself in telling the history of England, and in elucidating the history of the law from authentic MS. sources.[6] The outcome of this movement, so far as the statutes are concerned, was the edition of Pulton, begun in 1611, when he was almost eighty years of age, published in 1618, and continued in six successive editions down to 1670.[7]

Pulton[8] was a commoner of Brasenose College, Oxford, and a fellow of Christ's College, Cambridge. He was a member of Lincoln's Inn; but, because he was a Roman Catholic, he was never called to the bar. He devoted his life to editing the statutes; and we shall see that he had already published two abridgments of some or all of the statutes before he published his edition of the Statutes at Large.[9] The objects which he had in view, and the manner in which he proposed to accomplish them, are thus explained by Sir Robert Cotton:[10] "Mr. Pulton seeketh to print the statutes at large. He promiseth to set down which statutes or parts of statutes are repealed, and which, being at the first but temporary, are since expired and void because not revived. This he hath already done in his late abridgement. . . . Now, to make this new book at large saleable, he promiseth to print the statutes first in the language the same were first written; and such as were originally in French or Latin, he will translate and

[1] Statutes (Rec. Comm.) i *xxii*.
[2] Ibid App. A. no. 33 n.; for the list of statutes as issued by the king's printers see ibid App. B.
[3] Ibid App. A. no. 43.
[4] Ibid i *xxiii*.
[5] Vol. ii 427-428.
[6] Vol. v 402 seqq.
[7] Statutes (Rec. Comm.) i App. A. no. 47.
[8] Dict. Nat. Biog.
[9] Below 312-313.
[10] Statutes (Rec. Comm.) i *xxvii-xxviii*.

print likewise in English. When the statute has no title he will devise a title out of the body, and print it with the statute. He will set down which statutes are warranted by the record and which not. He will correct the printed book by the record. For which purpose he requireth free access at all times to the records in the Tower." Bowyer and Elsyng, the keepers of the Tower Records, threw some difficulties in his way; but their opposition was overruled by the intervention of Cotton, and in 1611 the requisite access was granted by the Council.[1] Pulton tells us that he had compared as many as possible of the old statutes "as be chiefly in use" with the original records; and that the rest he had corrected by the help of such books as the Register of Writs, the old and the new Natura Brevium, the books of Entries, the Books of Years, and the Terms of the law.[2] As the record commissioners have pointed out, the work is defective chiefly in the following points: the text in the original language is not printed, as the author had promised; it was merely private work, and not an official edition; it was a selection only of the statutes—the question whether any given statute excluded was repealed depending solely on the opinion of the editor; and all the statutes were not copied from and examined with the original records.[3] But, when these allowances have been made, it is clear that Pulton's edition was an advance upon all former editions of the statutes. He set a new standard to the makers of these editions, to which subsequent editors made at least an attempt to conform. We shall see that this standard was a good deal higher than that either aimed at or attained by those who edited the Reports of this period.[4]

(2) *The Abridgments of the Statutes.*

We have seen that, shortly after the introduction of printing, abridgments of the Year Books began to appear. The earliest of these abridgments was printed in or about 1490;[5] but still

[1] Statutes (Rec. Comm.) i *xxviii.*

[2] "First, with as great means care and industry, as possibly I could use, so many of the old statutes heretofore printed in the English tongue, made and published in the reigns of the first ten kings (accounting from 9 of Hen. III. unto 1 Rich. III. inclusive) as be chiefly in use and practice . . . have been by me truly and sincerely examined by the original records remaining in the Tower of London, and the residue with the Register of Writs, being the most ancient book of the law, the old and new Natura Brevium, the Book of Entries, the Books of Years, and Terms of the Law. . . . By reason whereof, the aforesaid defects . . . being reformed in this edition, as it is a collection of the most usual laws, gathered from out the Grand Codex of all the statutes, so it may serve as a correction to the former impressions," cited Statutes (Rec. Comm.) i *xxviii.*

[3] Ibid; as the Commissioners say, loc. cit., "It was particularly unfortunate that the author did not execute that part of his proposals which made their greatest merit, namely the giving an accurate copy of the original text of the antient statutes from the record."

[4] Vol. v 365-369.

[5] Vol. ii 543.

earlier—in 1481 or before—a "Vieux Abridgement des Statutes" had been printed by Lettou and Machlinia.[1] Its name correctly describes its character. The latest statute abridged is of the year 1455, so that it was already old when it was printed. Indeed it is not improbable that it had been for some time circulating among the legal profession in MS. In 1499 Pynson published a reprint and a continuation of this work;[2] and in 1519 John Rastell[3] published a translated abbreviation of the statutes based on this old abridgment, but brought down to date.[4] In 1528 two other abridgments appeared, one by Owen,[5] and the other by John Rastell.[6] The latter work was called "Magnum Abbreviamentum"—perhaps to distinguish it from the earlier work. An English edition entitled "The Grete Abregement of the Statutys of England untyll the XXII yere of Kyng Henry the VIII" was published by his son William Rastell in 1533.[7]

William Rastell[8] started his life in his father's publishing business, but he deserted it for the practice of the law. Unlike his father, he was a Catholic, and became a judge of the court of Queen's Bench under Mary. He retained this post till 1563. In that year he resigned, and died at Louvain in 1565. Probably he had retained his interest in the statutes all his life. At any rate in 1557 he published his great collection of statutes from Magna Carta down to his own day.[9] It is partly of the nature of an edition of the statutes at large, as the enacting parts of the public statutes in force are printed nearly word for word, and in their original language. But it is more of the nature of an abridgment. The subject matter of the statutes is arranged under alphabetical headings, and the preambles, private Acts, and obsolete Acts are generally omitted.[10] The book was frequently republished and

[1] Statutes (Rec. Comm.) i *xxi* App. A. no. 1; a copy of this is in All Souls Library at the end of an edition of Littleton's Tenures printed by the same printers; a leaf of this old abridgment is in the Bodleian, Inc. c. E 7, 1 (3).

[2] Ibid App. A. no. 8. [3] For John Rastell see above 253, 257.

[4] Statutes (Rec. Comm.) i App. A. no. 13; reprinted 1527 and later; in the preface Rastell says that he had translated "out of frenche into englysshe the abbrevyacyon of the statutys made before the first yere of the reyn of our late soveregn lord kyng Hen. the VII. and also, thoughe the statutys made as well in the tyme of the said Kinge Hen. the VII. as in the tyme of our soveregn lord that now is be suffyciently indytyd and written in our Englysshe tong, yet to them that be desyrous shortly to knowe the effect of them. . . . I have taken uppon me to abbregge the effect of them more shortly in this lytell book."

[5] Ibid nos. 14 and 17.

[6] Ibid no. 18; this was reprinted by other publishers.

[7] Ibid no. 24. [8] Dict. Nat. Biog.

[9] Statutes (Rec. Comm.) i App. A. no. 37; later editions 1559, 1565, 1574; with the statutes translated 1579, 1582, 1587, 1589, 1591, 1598, 1603, 1611, 1615, 1621.

[10] Rastell says in his Preface, "the printed statutes expired or repealed, or concerning private persons or some private places, I have (for the most part) left out of this worke, saving that of them I have made in their apt titles (as I thinke) a briefe remembrance. The residue of the Statutes imprinted, have I put in this worke (as I suppose) in their

brought up to date in successive editions;[1] and in 1579 the Latin and French statutes were translated.[2] Indeed it seems to have largely superseded the similar works, based on his own or his father's labours, for which the activity of the legislature had created a demand in the first half of the sixteenth century.[3]

In 1560 Pulton had begun his life work upon the statutes by the publication of "An Abstract of all the Penal Statutes which be general."[4] The plan of making a collection of the statutes dealing with a particular topic had been anticipated by a collection of the statutes to be executed by the justices of the peace, published by Berthelet in 1538.[5] And it was imitated, after Pulton wrote, by Thomas Ashe of Grey's Inn—a great maker of indices and abstracts.[6] His book, called "Epieicheia," was a table of the statutes equitably interpreted by the courts, and of the cases in which this interpretation was to be found.[7] It is a curious book. It begins with a learned introduction upon equity in general,[8] and then groups the cases under twenty heads. The statutes are placed in chronological order under each head; and after each statute are given the references to the cases.[9] It involved a great deal of labour, and can hardly have been of much practical value.

Pulton's Abstract, on the other hand, was a practical and a

apt titles word for word, as they be in the great statutes: onely leaving out as well certaine superfluous wordes, as also the most part of the preambles. . . . Nevertheless I have (I trust) put in those preambles, without which the body of the Statutes cannot well be perceived;" he concludes by warning the reader not to conclude hastily that all the statutes contained in the book are in force, and in any matter of importance to consult the statutes at large.

[1] Above 311 n. 9.

[2] Statutes (Rec. Comm.) i *xxii*, the commissioners say that the translation was executed "with superior care and industry," that the whole was "sedulously revised from time to time, and that the editions of 1591 and 1603 are particularly carefully corrected."

[3] E.g. the Great Abbrydgement of all the Statutes of England, Redman 1538 and 1540, Statutes (Rec. Comm.) i App. A. no. 27; the editions of Petyt and Myddylton in 1542, ibid. nos. 28, 29; the edition of T. Gaultier and T. Powell, ibid. no. 34.

[4] Ibid no. 38.

[5] Ibid no. 26; "In this Book are conteyned those Statutes, which to put in Execution the Justices of the Peace, Sheriffs, baylyffes, constables, and other ministers of Justice were of late admonished by the Kynges Majestie on payne to runne into his grace's moste hyghe indignation and displeasure."

[6] Vol. v. 374-375.

[7] "Epieikeia et Table generall a les annales del Ley, per quel facilment trouveres touts les cases contenus in yceux, queux concerne le exposition des Statutes per Equitie," 1609.

[8] Thus he cites, besides various Greek classical authors, Cyprian, Bracton, Aquinas, St. Germain, Plowden, West, and several canonists and civilians.

[9] A few of the heads will give an idea as to his method:—(1) Ou et queux Statutes liera le Roy et de queux il prendra avail par Equitie; (2) he deals similarly with the king's heirs and successors; (3) Ou et queux Statutes serra construe d'extender per Equitie al auters persons coment quils ne sont mention; (4)-(18) deal in a similar way with topics other than persons, such as things, place, time, number, estate, actions, process, pleading, trespass, tenure; (19) deals with the restriction of the generality of the words of statutes by equity; (20) deals with the question when a later statute will be taken to be within the equity of an earlier statute.

successful book. It was reprinted in 1577, 1594 and 1596.[1] In 1606 he followed it up with a large work entitled "A Kalendar, or Table, comprehending the effect of all the statutes that have been made and put in print, beginning with Magna Carta, enacted 9 H. 3, and proceeding one by one until the end of the session of Parliament 3 R. Jacobi: showing which are repealed, expired, altered, worn out of use, made for particular persons or places, and which are general in force or use. Whereunto is annexed an Abridgment of all the Statutes whereof the whole or any part is general in force and use."[2] The work thus consisted of two parts—a first part in which the statutes were arranged chronologically, and a second part in which their contents were summarized under alphabetical headings. This book was even more successful than his first. Down to 1618 it had gone through five editions.

Both Rastell's and Pulton's works were lengthy: and they necessarily grew larger with each succeeding edition. The want of a shorter volume seems to have been felt. This want was supplied by E. Wingate—the author of books on the Justice of the Peace and the Constable.[3] In 1641 he published, "Statuta Pacis; or a Perfect Table of Statutes now in force which any way concern the office of the Justice of the Peace;" and in 1642 "An Exact Abridgment of all the Statutes in force and use from the beginning of Magna Carta." This work was continued by W. Hughes and other writers, and was republished with the necessary additions down to 1708. It was much shorter than the other abridgments; but it had the defects of its qualities. As Cay said, the wording of the statutes was so varied for the sake of brevity that their sense was not always correctly reproduced; while the methods of the editors of the different editions were not always very consistent.[4]

These, then, are the principal editions of the statutes at large or the abridgments of the statutes published during this period. Of the new editions published after the Restoration I shall speak later.[5] Meanwhile we must turn to the more difficult task of giving some account both of the contents of the statutes thus printed or abridged, and of the manner in which they created new, or developed old branches of English law.

I have already dealt with the constitutional aspect of the statutes which established the English church upon its new basis;[6] and of the statutes which made necessary changes in the

[1] Statutes (Rec. Comm.) i App. A. no. 38.
[2] Ibid no. 45.
[3] Above 119 n. 2, 122 n. 8.
[4] Cay's Abridgment, Pref.
[5] Vol. vi c. 7.
[6] Vol. i 589-598.

judicial and administrative machinery of the state.[1] These statutes therefore we can pass over, except in so far as some of their provisions affected other branches of the civil or criminal law. Of the other statutes, by far the most important is the group which deals with economic and social questions. All through this period these questions were as urgent as the religious question; and the manner in which the Tudor kings and Parliaments dealt with them is the best proof of the wisdom of the executive, and of the political capacity of Parliament. Next in importance comes Henry VIII.'s famous legislation on the subject of Uses. The remaining topics on which there was legislation of some importance are the land law; ecclesiastical law; criminal law and procedure; and civil procedure. I shall deal with the legislation of this period under these heads.

Commerce and Industry

The legislation upon these topics covers a very wide field. It includes such matters as the organization of trade, foreign and domestic, the policy pursued by the state in relation to agriculture, and the regulation of the rights and duties of employers and employed; and the legislation upon these questions is intimately related to and reacts upon many other branches of the law. Thus the regulation of foreign and domestic trade touches upon certain prerogatives of the crown which assume an increased economic and administrative importance in this period, and a new constitutional importance in the next; and the legal solution of some of the problems created by the new economic ideas as to the conduct of trade gives rise, both to some of the rules of the law which the state enforced in the interests of social and national well-being, and to the beginnings of important branches of modern mercantile law. The agricultural policy of the state touches the land law and the land-owning class at many points, and is closely connected with the problem of maintaining an adequate food supply at reasonable prices. The regulation of the rights and duties of employers and employed resulted in the formation of a national code as to apprenticeship and conditions of employment, many of the features of which lasted till the industrial revolution of the latter part of the eighteenth century. Necessarily, both the agricultural and the industrial policy pursued by the state had important and permanent effects upon the ordering of all classes of society. It is to legislation on these topics, therefore, that we must ascribe some of the most characteristic features of the English commercial, industrial, and social life of the succeeding

[1] Vol. i 244, 281, 296, 342, 493, 547, 550; above 137-145, 155-158.

two centuries. It is by a study of the new ideas which it introduced into our legal system that we can see most clearly the manner in which the gradual transition from mediæval to modern habits of thought about these matters has been effected. It is by watching the technical expression given to these changes by the lawyers that we can see how it is that mediæval rules of law have assumed their modern form, and how it is that quite new branches of the law have arisen.

The mass of statutes dealing with these related subjects is very large; and, as is usual in an age of transition, the principles which underlie them are various. Modern ideas and institutions were arising; but they were arising from a mediæval foundation; and some of the mediæval ideas and institutions were being retained and adapted to the new order. We cannot therefore hope to understand these statutes unless we make a brief trespass on the domain of economic history, and say a few explanatory words about the economic ideas by which they were inspired.

Two main factors determined the course of this legislation in this century. In the first place there was the geographical factor, and in the second place there was the political factor. (1) The new geographical conditions removed the centre of European trade from the Mediterranean cities to the seaports which bordered on the Atlantic. "England had only been on a side eddy before, but the discoveries of the fifteenth century placed her on the main stream." As a result the foreign trade of England expanded during the whole of this century; and at the end of it she was beginning to take her place as one of the great commercial countries of Europe.[1] (2) The rise of the independent territorial state, and the new relations between these states were, as we have seen, the outstanding political features of this century.[2] The appearance of these phenomena naturally revolutionized men's ideas as to the principles upon which all branches of commerce and industry should be regulated. At the same time the new institutions which increased both the intensity and the efficacy of the government of these states made it possible to reorganize industry and commerce so as to give effect to these principles. The state aimed at controlling and regulating the activities of its subjects in such a way that it gained in power and strength not only within its own borders, but also relatively to other states.[3] But to attain

[1] Cunningham, Industry and Commerce i 473, 474.

[2] Above 191-192, 214, 289-290.

[3] Cunningham, op. cit. i 478, 479—before the sixteenth century, "industry and commerce had been considered almost entirely with reference to the internal condition of the country;" in the sixteenth century, "our statesmen considered the condition and progress of England not by itself, but relatively to that of other nations; what they sought was not mere progress within their own land, but they wished to prosper relatively to other nations."

this ideal it is clear that all branches of commerce and industry must be carefully regulated. Their regulation could no longer be left to municipalities or leagues of merchants. It must be taken over by the state itself.

The regulation by the state of commerce and industry with this object in view is known as "the Mercantile System." As early as Richard II.'s reign the guiding principle of this system had made its appearance; and all through the fifteenth century it had inspired much legislation on matters pertaining to external trade.[1] In the sixteenth century it was extended to all branches of commerce and industry. It is the guiding principle underlying the mass of legislation upon these topics. Nor did the assumption that the activities of individuals should be thus restrained and guided to promote a political ideal appear strange to the men of the sixteenth century. The idea that a man may do as he likes with his own would have been wholly denied by mediæval lawyers and political philosophers;[2] and in this respect the lawyers and political philosophers of the sixteenth century agreed with them. Property, said the Doctor and Student,[3] was given by the law of man, not by the law of God or reason; and therefore "the same law may assigne such conditions upon the propertie as it listeth, so they be not against the law of God nor the law of reason." Therefore the state could determine the limitations under which property could be acquired. In other words it could regulate the conditions under which all branches of commerce and industry could be carried on. The idea that there should be restrictions was old. It was the ideal aimed at by these restrictions which was in some respects new.

We have seen that the ideal aimed at by the mediæval legislators and teachers was a moral ideal—honest manufacture, a just price, a fair wage, a reasonable profit.[4] But we have seen that this moral ideal was less applicable to foreign trade than it was to domestic trade; and that in foreign trade the ideal aimed at was rather the material advantage of Englishmen and the English state. Thus, as we have seen, the mercantile system had already

[1] Vol. ii 471-472. [2] Ibid 468-469.

[3] Bk. i c. 3, "The propertie of goods is not given to the owners directly by the law of reason nor by the law of God, but by the law of man, and is suffered by the law of reason and by the law of God so to bee. For at the beginning all goods were in common, but after they were brought by the law of man into a certain propertie, so that everie man might know his owne: and then when such propertie is given by the law of man, the same law may assigne such conditions upon the propertie as it listeth, so they be not against the law of God nor the law of reason, and may lawfully take away that it giveth, and appoint how long the propertie shall continue;" cf. Crowley, An Informacion to Parliament (E.E.T.S) 157, "If there were no God then would I think it leaful for men to use their possessions as thei lyste."

[4] Vol. ii 468-469.

begun to inspire the legislation relating to foreign trade.[1] In the sixteenth century both economic and political causes led to the extension of the influence of the ideas underlying this system to domestic trade. The growing wealth of the country was giving rise to a more elaborate organization of industry. Largely owing to the extension of foreign trade, capital was making its appearance; and persons were ready to embark their capital in new enterprises which seemed likely to be profitable to themselves.[2] At the same time as wealth increased prices rose;[3] and this was an additional incentive to break through the mediæval rules, and conduct all undertakings in the manner which would return the largest profit. Traders deserted the towns in order to be freed from the restrictions and pecuniary exactions imposed on them by the gilds.[4] Landlords raised rents, or evicted their tenants and created sheep farms in order to secure the larger profits which could be made out of wool; and labourers combined to demand higher wages.[5] This desire to gain wealth, openly pursued in defiance of the old rules which regarded such self seeking as immoral, is, as Professor Ashley has said, simply a phase "of what we now call the individualism of the Renaissance."[6]

[1] Vol. ii 472.

[2] Ashley, Economic History, Pt. ii 226—"It was the new mercantile capital created by successful foreign trade, and largely in the export of cloth itself, which turned back, as it were, upon industry, and by seeking to control and direct the processes of manufacture brought about the substitution of the domestic system for the gild;" under the gild system the master employed two or three men, bought the material, made it up, and sold the product—he was shop-keeper as well as artisan; under the domestic system the master sometimes received the material from, and always sold the finished product to, a merchant, who saw to the work of distribution; this system is intermediate between the earlier gild and the factory system of to-day, ibid Pt. ii 219, 220; for some legal difficulties to which the change from the gild to the domestic system gave rise see Select Cases in the Star Chamber (S.S.) ii *xcvi-ci* 75 seqq.—in that case the trading companies of merchants at Newcastle succeeded in preventing the craftsmen from dealing in commodities other than those manufactured by them—obviously the growth of the distinction between the merchant and the craftsman is becoming clear; the Council would interfere if members of one trade tried to encroach on the province of another, see S.P. Dom. (1611-1618) 186 lxxiv 1—an order as to bricklayers and plasterers.

[3] Cunningham, op. cit. i 544, 545.

[4] Ibid 507, 509; Gross, Gild Merchant i 52; Select Cases in the Star Chamber (S.S.) i, *clii*, *cliii* 36-38; 71-95; ii, *cii-cvi*; cf. 36 Henry VIII. cc. 8, 9; 27 Henry VIII. c. 1; 32 Henry VIII. cc. 18, 19; 33 Henry VIII. c. 36; 35 Henry VIII. c. 4.

[5] Above 24.

[6] Op. cit. 49; cf. Crowley, Epigrams (E.E.T.S.) 11 (there cited),

> ". . . This is a city
> In name; but in deed
> It is a pack of people
> That seek after Meed . . .
> An Hell without order
> I may it well call
> When every man is for himself
> And no man for all."

Both the preambles to the Tudor statutes[1] and writers on economic subjects repeated the old denunciations of covetousness and self-seeking,[2] but these denunciations began to look archaic and unreal now that changed commercial conditions and a changed moral outlook had caused men to abandon the mediæval ideal. Moreover these new commercial conditions and this changed moral outlook were in harmony with and to a large extent the outcome of the new political conditions of the Europe of the sixteenth century. The state must protect itself against its rivals; and when the state proceeded to regulate all branches of industry and commerce "not as matters of right and wrong, but with a view to political expediency," it is clear that it was not the moral rectitude of a transaction, but "its bearing on the power of the state that had come to be the criterion of what was allowable."[3] Thus although these new regulations still used the language of the mediæval legislator, and breathed some of the spirit of the mediæval ideal, the moral aim of the mediæval legislator had to a large extent given place to the desire to secure the material power of the state. It was because the legislation of the earlier half of the sixteenth century was the legislation of a period which halted between these two ideals that it was often confused and inconsistent.[4] It was not until

[1] Cf. Select Cases in the Star Chamber (S.S.) ii *xxxix*, *xl* for illustrations.

[2] Cunningham, op. cit. i 556-558; in 1597 the Council described ingrossers as "wycked people in condicions more lyke to wolves or cormorants than to naturall men, that doe most covetously seeke to holde up the late great pryces of corn and all other victualls by ingrossing the same into theire private hands;" cf. Crowley, Last Trumpet, the Merchant's lesson (E.E.T.S.) 86, 87:—

> "Though thou maist the money forbeare,
> Til other men's store be quite spent,
> Yet if thou do so, that thy ware
> May beare high price, thou shalt be shente,
> Thou shalt be shente of Him I say,
> That on the seas did prosper the,
> And was thy guide in al the way
> That thou wentest in great jeoparde."

[3] Cunningham, op. cit. i 558; thus Crowley (op. cit. in last note), though he is very mediæval in his economic ideas, tells the merchant that:—

> "Thy richesse was geuen to the,
> That thou mightest make provision,
> In farre contreys for thinges that be
> Nedeful for thine owne nacion;"

this ideal is very clearly stated in Hobbes, Leviathan (1st Ed.) 129, "To assigne in what places, and for what commodities, the subject shall traffique abroad, belongeth to the Soveraigne. For if it did belong to private persons to use their own discretion therein, some of them would bee drawn for gaine, both to furnish the enemy with means to hurt the Commonwealth, and hurt it themselves, by importing such things, as pleasing men's appetites, be nevertheless noxious, or at least unprofitable to them."

[4] Thus "The Discourse about the Reformation of Many Abuses" in Edward VI.'s handwriting (printed by Burnet, Hist. Ref. (Pocock's Ed.) v 96-102) is very mediæval in its complaints and suggested remedies; it may usefully be compared with "The Discourse of the Common Weal," probably written by John Hales in

the reign of Elizabeth that the legislature clearly recognized the new political and economic conditions, and modified the mediæval ideal to suit these new conditions.

This modification was rendered possible by the fact that these two very different ideals had something in common. Both the mediæval and the sixteenth century legislator agreed, "that there cannot be any greater bane to a well-governed commonwealth than ill-governed and disorderly trade."[1] Both agreed in denouncing the pursuit of wealth for its own sake. Both endeavoured to secure the manufacture of honest goods, skill in the workmen, fair prices, and fair wages. Both prohibited forestalling, regrating, and combinations to raise wages. Both aimed at getting a reasonable supply of labour for the various callings which were necessary to secure the health and strength of the nation. And because these two ideals had much in common, it was possible to adapt the mediæval institutions to the needs of the sixteenth century. A glance at the manner in which (1) the external and (2) the internal trade of the country was organized during the period will make this clear.

(1) In the mediæval period, when the principal foreign trade of the country was the export of raw wool, and when this trade was largely in the hands of foreigners, it was chiefly controlled by the system of the Staple towns, and the organization of the merchants of the Staple.[2] But this method of control became less effective when England became a manufacturing country, and when English merchants had begun to take into their own hands the conduct of their foreign trade.[3] Hence during this period the Staple system declined[4] and its place was taken by either regulated or joint stock companies.[5] The oldest of the

1549; the latter tract is as much in advance of the time as the former is behind it, see Cunningham, op. cit. i 559-566.

[1] E. Misselden, Free Trade, cited by J. B. Williamson, Foreign Commerce of England under the Tudors 65 n. 5; cf. Mayor and Commonalty of Colchester v. Goodwin (1666) Carter's Rep. 115, "a general liberty of trade without a regulation doth more hurt than good," *per* Bridgeman C.J.; the Council carefully regulated the places to which cloth—England's most important manufactured product—should be exported, as sending the chief commodity of the realm "in scattering sort" prejudiced the whole trade, Dasent xxix 24, 25 (1598); cf. xxvii 50 (1597); xxxi 440-441, 451 (1601); see below 381 n. 1 for another advantage derived from such regulation.

[2] Brodhurst, The Merchants of the Staple, L.Q.R. xvii 61 seqq.; for a discussion of the date at which this company was founded see ibid 71-73; Scott, Joint Stock Companies i 8, 9; vol. i 542-543.

[3] See vol. ii 471-472 for the change in the economic policy of the state at the end of Edward III.'s reign, which, for the encouragement of the alien to import manufactured goods, substituted the encouragement of the native to manufacture and export his manufactured goods.

[4] L.Q.R. xvii 74-76; Cross, Gild Merchant i 147.

[5] For the differences between these two varieties of company see Bk. iv Pt. ii. c. 4 1 § 4; the regulated companies were those into which any English subject might

regulated companies was the Merchant Adventurers, which was incorporated in Henry VII.'s reign, and received further powers in Elizabeth's reign.[1] Other regulated companies were the Merchants of Andalusia (1529),[2] the company of merchants trading to France (1611),[3] and the Eastland Company (1579).[4] The Russia Company and the Levant Companies began as joint stock companies, and, in the earlier part of the seventeenth century, became regulated companies.[5] The greatest of all—the East India Company (1600)—was originally something between a regulated and a joint stock company.[6] Other joint stock companies to trade in parts of Africa and round Hudson Bay belong rather to the latter half of the seventeenth century.[7]

It was through these chartered companies that the government endeavoured to regulate foreign trade in such a way that it was beneficial to the nation as a whole. These companies were able, on the one hand, to secure privileges for their members abroad, and to give them facilities for the conduct of their business; and, on the other hand, they were able to insist upon the maintenance of a high standard of commercial morality, of adequate prices, and of the merchantable quality of the goods sold.[8] Moreover the limitation of trade in these defined channels helped the government to collect the customs revenue,[9] to deal with international complications arising out of foreign trade,[10] and, as we shall see, to so regulate exports as to mitigate or prevent unemployment caused by seasons of depressed trade.[11] Thus although these companies were often attacked as monopolies by "interlopers" who wished to be able to trade as they pleased, they stood their ground all through this and the greater part of

get admission; and, when admitted, he traded with his own capital under the rules of the company. The joint stock companies were companies which traded with a common capital, shares in which were not always procurable, see J. B. Williamson, Foreign Commerce of England under the Tudors 50; Cunningham, op. cit. ii 215-216; Carr, Select Charters of Trading Companies (S.S.) xx, xxi; but at first this distinction was not so clear cut, Carr, loc. cit.; Scott, Joint Stock Companies i 10.

[1] Gross, op. cit. i 148-157; The Newcastle Merchant Adventurers (Surt. Soc.) i *xxxiv-xxxv*; Scott, op. cit. i 9, 10.

[2] Carr, op. cit. xxiii-xxxv 1-3. [3] Ibid 62. [4] Ibid xxii.

[5] Scott, op. cit. ii 36-69, 83-88; the former company was unique in that it got statutory as well as royal authority for its charter, see 8 Elizabeth c. 17.

[6] Ibid ii 96, 97; Cunningham, op. cit. ii 273-284.

[7] There were various earlier companies formed to trade to Africa which were the precursors of the Royal Africa Company of 1672; for these see Scott, Joint Stock Companies ii 3-17.

[8] Cunningham, op. cit. ii 219, 220, 239; in earlier days the Staple system had been used to attain similar results, L.Q.R. xvii 62-64; cp. Acts of the Privy Council 1613-1614) 247-248 for the reasons for incorporating the company of merchants trading to France.

[9] Cunningham, op. cit. ii 221.

[10] See Acts of the Privy Council (1613-1614) 316-317.

[11] Cunningham op. cit. ii 221; below 381.

the following period.[1] The existence of some such bodies was in fact necessary if the ideal of the legislators of this period was to be realized. And just as this ideal formed the intermediate stage between the mediæval ideal which looked primarily at the moral aspect of commercial dealings, and the modern ideal which allows the individual to pursue his own interest in his own way; so these bodies hold an intermediate place between the mediæval gild and the companies and combinations of modern times. If we look at some of their external features, and at some of the purposes which they served, we can see that "they form a connecting link between the intermunicipal trade of the Middle Ages and the world-wide commerce of modern times."[2] If we look at the internal relations of their members, and the modes in which they acted, we can see that they form a connecting link between the mediæval gild community and the corporate societies which were spreading from Italy over the commercial world.[3]

(2) To control internal trade the Tudors and early Stuarts modified and controlled, but at the same time recognized and enforced, the powers of the existing organizations of borough and gild;[4] and they were ready when necessary to incorporate new companies to supervise the new trades which were beginning to spring up.[5] It was on these bodies, and on the justices of the peace and other local authorities in the country at large, that the legislature relied to carry out this policy as to the regulation of internal trade and manufacturing processes. The methods which it employed were various. Occasionally it confined the manufacture[6] or the sale[7] of a particular article to a certain locality in order that some special local authority might the more effectually supervise it. But the more usual course was to confer new statutory powers upon the ordinary local authorities, or trading

[1] Acts of the Privy Council (1613-1614) 22, 378-379, 398-399; Cunningham, op. cit. ii 216-219—in 1622 the commissioners of trade, after careful examination, came to the conclusion that these companies served a useful purpose; and, under the Commonwealth, after an experience of unregulated trade, it was found necessary to revert to the old system; Scott, Joint Stock Companies i 182-183, 272-273; below 351, 353.

[2] Cunningham, op. cit. i 416. [3] Bk. iii Pt. 2 c. 4 I § 4.

[4] This appears in almost every volume of the proceedings of the Privy Council; the principle is well expressed in a letter from the Council to the Lord Mayor of London in 1601, Dasent xxxi 67-68, directing him to enquire into the reasons for the high price of coal; he is asked to enquire because, "having charge of her Highnes of that cittie and being best acquainted with the nature and course of all trades and of all commodities brought thither, (he) can best discerne the deciptes and abuses which do arise in any kinde of merchandize;" as Cunningham says, op. cit. i 517, "The old institutions continued to be used as far as was practicable. It was the policy of the government to reorganize and recreate mysteries, or fellowships, or craft gilds in places where they did not then exist, so long as they were really kept in subjection to parliamentary or judicial authority."

[5] Cunningham, op. cit. ii 303-307.

[6] 21 Henry VIII. c. 12 (cables); 34, 35 Henry VIII. c. 10 (coverlets).

[7] 24 Henry VIII. c. 1 § 2 (leather).

corporations. Thus many statutes empowered mayors or other head officers of corporate towns, constables or justices of the peace, to see the observance of the statutes relating to the quality of manufactured goods.[1] Similar powers were given to the gilds and companies of merchants or craftsmen;[2] and we shall see that the statutes relating to apprenticeship put large powers into the hands of the mayors and justices.[3]

Thus the machinery by which the external and internal trade of the country was regulated during this period had a good deal in common with the mediæval machinery. But there was a fundamental difference. Seeing that the object of the legislator in this period was the increase and maintenance of the power of the state, nothing less than a national system of regulation would serve. Though some of the older agencies were used, they either were or tended to become bodies of capitalists rather than of craftsmen; and they were employed, not to regulate commerce and industry at their own discretion and according to their own ideas, but rather to apply the statutes which Parliament had made upon these matters, and to carry out the instructions of the executive government.[4] It is true that upon some matters there had been general statutes from an early period,[5] and that in Henry VI.'s reign the justices of the peace had been given some control over ordinances made by gilds and other similar bodies.[6] But in this period national control was largely extended. A statute of Henry VII.'s reign disallowed all the ordinances of crafts, mysteries, gilds, or fraternities unless they were assented to by the chancellor, treasurer, the chief justices or any three of

[1] 3 Henry VIII. c. 6; 5 Henry VIII. c. 4; 23 Henry VIII. c. 4 § 3; 24 Henry VIII. c. 1 § 4; 25 Henry VIII. c. 9 § 2; 2, 3 Edward VI. c. 11; 3, 4 Edward VI. c. 2 § 2—Justices to appoint overseers of cloth in towns not corporate; 5, 6 Edward VI. c. 6 § 9; 39 Elizabeth c. 20; Dasent xxxi 78-79 (1601)—Justices of Lancaster are to enquire into abuses in the cloth manufacture.

[2] 3 Henry VIII. c. 10 (curriers); 5 Henry VIII. c. 4 (worsted); 24 Henry VIII. c. 1 § 2 (curriers); c. 2 § 3 (dyers); 34, 35 Henry VIII. c. 10 § 3 (coverlets); 23 Henry VIII. c. 4 § 5 (coopers); 25 Henry VIII. c. 9 (pewterers); 5 Elizabeth c. 8 § 31 (saddlers, curriers, shoemakers); in many places we get towards the end of the period the union of several trades in one company, Cunningham, op. cit. ii 36 n. 4; as is there said, "a composite body of this sort would be quite able to enforce the Elizabethan law in all the trades it embraced;" in 1591-1592 the fishmongers company were appropriately entrusted with the duty of seeing that the statutes as to the Political Lent were observed, Dasent xxii 216-218; xxvi 541.

[3] Below 341, 342.

[4] Cunningham, op. cit. ii 35, 36, speaking of the resuscitation of industrial companies at the latter part of Elizabeth's reign, says that they were "different in many ways from the craft gilds even when they were erected upon their ruins. They were, for the most part, bodies of capitalists rather than of craftsmen; and their powers emanated from Parliament or the Crown, and not from mere municipal authority. They thus served as the local agents for carrying out a national industrial policy;" cf. Ashley, Economic History Pt. ii 70, 71, 156-167.

[5] Vol. ii 467.

[6] Ibid 400; 15 Henry VI. c. 6.

them, or by both the judges of Assize for that county in which the ordinance had been made;[1] and other statutes of this period were passed to prohibit particular kinds of oppressive conduct on the part of some of these bodies.[2] Edward VI.'s legislation, which confiscated those parts of the property of these societies which were devoted to religious uses, emphasized their subordination to the state;[3] and this was still further emphasized by statutes passed to regulate particular trades.[4]

More especially was this control emphasized by the manner in which the Council frequently, and the common law courts and the court of Chancery occasionally, enforced the existing law, and controlled the exercise of the powers and discretions vested in the bodies entrusted with the enforcement of the statutes.[5] Thus the Council interfered with elections to offices,[6] and with

[1] 19 Henry VII. c. 7, reciting the act of Henry VI., enacts that, "No maisters, wardens, and felishippes of crafts or mysteries nor eny of them, nor eny rulers of guyldes or fraternities take uppon them to make eny actes or ordinaunces, ne to execute eny actes or ordinaunces be them hereafore made, in disinheritaunce or diminucion of the prerogatyffe of the king, nor of other, nor ageynste the comen profite of the people, but yfe the same actes and ordinaunces be examyned and approved by the Chancellor, Tresorer of Englonde and cheffe Justices of either Bench, or thre of them, or before both the justices of Assise in ther cyrcute or progresse in that shyre where such actes or ordinaunces be made;" moreover acts to restrain persons from suing to the king or his courts are specially forbidden. It was held in Elizabeth's reign that even acts so approved might be held to be void if they were contrary to the common law, below 352 n. 7. For the importance of this statute see Ashley, Economic History Pt. ii 159-161.

[2] 3 Henry VII. c. 10—ordinance of the City of London; 12 Henry VII. c. 6—oppressive conduct of the Merchant Adventurers; 22 Henry VII. c. 4—evasions of 19 Henry VII. c. 7; 28 Henry VII. c. 5—oaths imposed upon apprentices in restraint of trade; 2, 3 Philip and Mary c. 11—oppression of weavers by clothiers; 3 James I. c. 9—the Eastland merchants and the skinners.

[3] 1 Edward VI. c. 14; Professor Ashley has shown, Economic History Pt. ii 145-158, that this statute was by no means destructive of gilds which existed for secular purposes; and that the powers given to the commissioners by the Act were used fairly; § 7 of the act expressly exempts craft gilds—the king is to have all lands and other hereditaments belonging to fraternities brotherhoods and gilds "other than suche corporacions guyldes fraternities companyes and felowshippes of misterys or crafts." The earlier Act of 1547, 37 Henry VIII. c. 4, which dealt with this subject had expired with the king's death.

[4] Two good instances are 1 James I. c. 16—watermen; 21 James I. c. 31—an Act creating a company of cutlers in Hallamshire and giving them extensive powers.

[5] Select Cases in the Star Chamber (S.S.) i 225-226, 262—two cases on the statute 19 Henry VII. c. 7; Dasent vi 379 (1558)—misuse by the clothiers of their powers; viii 375 (1575)—impositions levied by the town of Poole, and restitution ordered; ix 206 (1576)—misdeeds of the cloth workers company; for action by the common law courts see Bonham's Case (1610) 8 Co. Rep. 113b—as to the powers of the College of Physicians; for action by the Chancery see 1 Cal. Ch. xli (Hy. VI.)—complaint of irregularity of proceedings in a court of the town of Scarborough; lxxxvii (Ed. IV.)—unjust imprisonment by the mayor of Marlborough; ci (Ed. IV.)—oppression by an alderman of Norwich; xciv (Ed. IV.)—oppression by the warden of the shoemakers company; Select Cases in Chancery (S.S.) no. 42—complaints against the mayor of Southampton.

[6] Dasent i 31 (1542)—Merchant Adventurers; xviii 45-46 (1589)—the Goldsmiths' Company.

disputes between officers and members [1] or servants [2] of these new trading companies; it prescribed the admission of members; [3] it encouraged or prohibited particular trading voyages to different parts of the world; [4] it exercised control over the manner in which the gilds or crafts supervised the quality of the goods manufactured [5] and over the prices charged for these goods; [6] and it enforced the reasonable orders made by these societies.[7] In fact the same change which I have noted in the position of the older bodies entrusted with the conduct of local government was taking place in the case of the bodies entrusted with the management of commerce and industry.[8] They still remained. They were still entrusted with the execution of the law. But since the law was more detailed in its provisions, their sphere of independent action was curtailed; and the executive government endeavoured to secure obedience to the law. At the same time the large powers which the central government assumed over all branches of commerce and industry enabled it, by the gift of special powers and privileges, to promote new industries free from the statutory or other legal restrictions which affected the older trades.[9]

Though commerce and industry was thus carefully and even minutely regulated by the legislature and the Council, considerably more freedom of action was left to the individual than under the mediæval regime. These new national regulations were inspired quite as much by the desire to increase the power of the state, as by the desire to do abstract justice to all members of the state. Self-interest and the desire for private gain might be very reprehensible; but they were not on that account to be merely

[1] Dasent ix 176, 186 (1576)—the Goldsmiths' Company; xi 66 (1578-1579)—collection of a contribution from members of the Muscovy Company; ibid 84—waterman's company, oppression of a member; xxxi 272, 303—money due in respect of a venture of the East India Company; cf. 2 Cal. Ch. xiii (Hy. VI.)—a bill by the bailiff of the craft of weavers in London to compel certain members of the guild to contribute to the farm payable to the king.

[2] Dasent xi 82 (1578-1579); xiii 378 (1582); xix 228 (1590); xxviii 362 (1597-1599); xxix 421 (1598).

[3] Ibid xiv 10—the Barbary merchants, 97 the Merchant Adventurers (1585-1586); xviii 218 (1589)—the Merchant Adventurers.

[4] Ibid v 214 (1555)—trading voyage forbidden; xi 137-138 (1579)—advice to the Spanish corporation; xxxii 259 (1601)—East India Company ordered not to abandon a proposed voyage.

[5] Ibid ix 221 (1576)—cloth; x 439 (1578)—soap boilers; xii 83 (1580)—wine; xix 35 (1590)—sword blades; xxv 60 (1595)—barrels; we find very frequent mention in the records of the Council of the appointment of commissions to enquire into abuses and contraventions of the law; a good illustration is a commission of 1591-1592 appointed to enquire into frauds in the manufacture of cloth, Dasent xxii 89, 407.

[6] Ibid xiii 7, 8 (1581)—excessive prices charged for silk.

[7] Ibid v 295 (1556)—order of Merchant Adventurers as to export of cloth; x 408-409 (1578)—order of the Spanish Company upheld; x 37-38 (1577), the Spanish Company, and, xii 207 (1580), the Eastland Company, were not to be interfered with by the common law courts.

[8] Above 164.

[9] Below 344-346.

denounced, as the mediæval writers had denounced them. If certain of their manifestations could be so used as to lead to an increase in the aggregate wealth of the state, they ought to be so used. Where the interest of the individual and the state coincided the individual was left free to make his profit and thus to benefit the state.[1] It was as much because this new system of regulating commerce and industry left more liberty to the individual, as because it introduced a new aim and a new organization, that it created so decisive a break with mediæval ideas, and led to so much confusion and suffering in the earlier stages of this period of transition.

The mediæval ideal in this, as in other departments of law and government, was impossible of complete realization. But the attempt to realize it conferred two lasting services upon the country. In the first place, it created a commercial morality. It was a time when, as Professor Ashley has said, "elementary conceptions of good and honest work needed to be driven into the general conscience by minute rules vigorously enforced; when what was required was discipline rather than spontaneity."[2] In the second place it created an organization strong enough to protect the activities of the worker. Under its shadow "grew up a wide middle class of opulent traders and comfortable craftsmen."[3] But it had had its day and done its work even before the beginning of the sixteenth century. Like other mediæval institutions,[4] it was hindering the growth of that which it had created. Neither the mediæval ideal nor the mediæval machinery was suited to this new age. The new system, though it partially abandoned the ethical aim of the mediæval system, substituted a new ideal which was something a great deal higher than the self-interest of the individual; and the enlightened pursuit of that ideal gave a new impetus to the growth of commercial morality by widening the sphere within which its rules operated. The mediæval trader was too apt to think that the duties he owed to his neighbours were confined to those who were his neighbours in a very limited geographical sense.[5] The national organization of commerce and industry gave to these duties a wider range.[6] They must embrace not only Englishmen but even foreigners;

[1] See the extracts from the Discourse of the Common Weal cited by Cunningham, op. cit. i 562.

[2] Economic History Pt. ii 168. [3] Ibid.

[4] Vol. ii 411-418.

[5] Ashley, Economic History Pt. ii 12—"However wide might be the liberty actually enjoyed by 'foreigners' (i.e. non freemen) it was always regarded as something exceptional, as a conditional favour, a more or less grudging concession dictated by expediency."

[6] See Dasent viii 121-122 (1573), xiii 277 (1581), for interferences by the Council to secure fair treatment for foreigners.

for unless honest work was secured the trade which was essential for the maintenance of the increase and power of the state would depart.[1] If the standard aimed at was less lofty, the range was far wider and the means to secure its realization were more general and more effective. The new ideal which it enforced was a constant education in the duty of patriotism. It thus helped to consolidate the power of the state, and was therefore a factor of no small importance in the establishment of the new political order.

If we keep these developments in view, we shall be able, in the first place, to understand the numerous statutes which gradually established, and, in Elizabeth's reign, finally settled, commerce and industry on its new basis; and, in the second place, to see the manner in which the new economic ideas, by which these statutes were inspired, changed the shape of old principles, and introduced a number of new principles into many different branches of the law. I shall describe the provisions and effects of some of the most important of these statutes under the following heads: (1) Trade, external and internal; (2) Agriculture, the food supply and prices; (3) Employer and workman; (4) Unemployment and pauperism; (5) Classes of society.

(1) *Trade, External and Internal.*

The regulation of trade, external and internal, with a view to the maintenance and increase of the power of the state took many different forms, and for that reason, gave rise to many legal developments, legislative and otherwise. The first and most important consideration was that of national defence by land, and more especially by sea. With that object all industries which promoted the shipping interest were encouraged. In the second place it was realised that, on an emergency, treasure was of paramount importance, and therefore attention was given to its accumulation and retention in England. In the third place foreign trade was promoted by encouraging the export of English, and discouraging the import of foreign manufactured goods. In the fourth place the maintenance of old and the growth of new manufacturing industries was promoted both by legislation which was designed to ensure skill in the workman and good quality in the manufactured product, and by other measures which were directed to the encouragement of new industries, and the due regulation of industries old and new. I shall deal with these developments

[1] This comes out in the preambles to some of the Elizabethan statutes; see e.g. 23 Elizabeth cc. 8, 9; 35 Elizabeth c. 10; 39 Elizabeth c. 20; 43 Elizabeth c. 10; cf. Dasent ix 221 (1576)—an order as to suppression of frauds in the cloth industry as these frauds, if allowed, injure the trade.

under the following heads: (i) the maintenance of an adequate system of national defence; (ii) the maintenance of an adequate stock of the precious metals; (iii) the promotion of foreign trade; (iv) the preservation and regulation of industries already established, and the encouragement of the growth of the new industries; (v) the enforcement of this commercial policy.

(i) *The maintenance of an adequate system of national defence.*

Among the statutes which regulated trade with a view to the maintenance of an adequate system of national defence we must assign the most important place to those which concerned the navy.[1] We have seen that under the two first Tudor kings England abandoned the vain attempt to win territory upon the continent of Europe, and contented herself with becoming the holder of the balance of power between the European states.[2] But to maintain this position an efficient navy was the first essential. We have seen that as early as Richard II.'s reign the shipping interest had been encouraged by a prohibition of the import or export of goods in any but English ships.[3] Two statutes of Henry VII.'s reign, passed in 1485 and 1488-1489, provided that wine and woad should only be imported in English ships,[4] and the later of the two required the master and mariners of the ship to be English, Irish, or Welsh. Henry VIII. took an active interest in all maritime matters.[5] The incorporation of the Trinity House, the beginnings of a royal navy, and the attempt to establish a naval arsenal at Deptford date from his reign;[6] but to raise revenue he issued many dispensations from Henry VII.'s Acts.[7] Parliament protested against this practice;[8] and in 1515 the statute of 1488-1489 was confirmed.[9] But dispensations continued to be issued.[10] The result was that Parliament found it necessary to make further and similar provisions in 1531-1532,[11] and in 1540 to pass a more comprehensive Act.[12] The preamble drew attention to the paramount importance of shipping to an island like England; and complained that the old laws which were designed for its maintenance were not observed by persons who considered only "their own singular lucre and advantage." The former laws were to be observed; the rates of freights were fixed; notices were to be given of the sailings of

[1] For a good account of these laws see a paper of Mr. E. F. Churchill, L.Q.R. xxxvii at pp. 413-425.
[2] Above 28, 33.
[3] Vol. ii 472.
[4] 1 Henry VII. c. 8 (wine); 4 Henry VII. c. 10 (wine and woad).
[5] Above 35.
[6] Vol. i 546; Cunningham, Industry and Commerce (4th Ed.) i 497, 498.
[7] L.Q.R. xxxvii 465.
[8] Ibid.
[9] 7 Henry VIII. c. 2.
[10] L.Q.R. xxxvii 416.
[11] 23 Henry VIII. c. 7 § 1.
[12] 32 Henry VIII. c. 14.

ships; and aliens were encouraged to use English ships by the remission of the customs duties affecting aliens in favour of those who complied with this condition. "This Act," says Dr. Cunningham,[1] "gives a clear statement of the political objects of the navigation acts . . . and the attempts to remove the practical difficulties which had rendered previous measures inoperative show a considerable advance on the laws which had been already passed." Some of these statutes were repealed in Edward VI.'s reign;[2] but in 1558-1559 a tentative return was made to some of the older ideas by an Act which offered advantages to those who used English ships, and penalized those who used foreign ship.[3]

In the meantime the progress of the Reformation had shown that one of its consequences might be dangerous to the navy. The abolition of fast days meant less consumption of fish and the decay of the fishing industry. But the fishing industry was a fine school of seamanship. It was therefore protected by an Act of 1549, which introduced the "Political Lent."[4] This Act provided that on Fridays, Saturdays, Ember days, and during Lent, fish should be consumed instead of flesh.

In 1562-1563 the policy of Henry VII.'s and Henry VIII.'s statutes, and the policy of the Political Lent, were combined in an Act entitled "certain politique constitutions made for the maintenance of the navy."[5] Free export and import of fish was permitted. No fish was to be carried coastwise in foreign ships. Wednesdays and Saturdays were to be observed as fish days. Wine and woad were only to be imported in English ships. The conditions under which corn might be exported in English ships were defined.

The observance of the Political Lent was enforced down to the time of the Great Rebellion;[6] and as late as 1663-1664 it was ordered to be observed by Proclamation.[7] But after that date it seems to have been abandoned, though the statutes which had created it remained unrepealed till the nineteenth century.[8]

[1] Op. cit. i. 491.

[2] 5, 6 Edward VI. c. 18 repealing 4 Henry VII. c. 10—the reason being, "that the saide Wynes and Woade be daylie sold at suche excessyve price as hathe not before byne sene within this Realme, and the Navye of the Realme thereby never the better maynteyned."

[3] 1 Elizabeth c. 13; cp. L.Q.R. xxxvii 417.

[4] 2, 3 Edward VI. c. 19.

[5] 5 Elizabeth c. 5; some small modifications were made by 13 Elizabeth c. 15 and 23 Elizabeth c. 7; the latter statute was repealed by 39 Elizabeth c. 10; other modifications were made by 1 James I. c. 29; 1 James I. c. 23, which gave facilities to fishermen for the pursuance of their trade, was inspired by a similar aim.

[6] Cunningham, op. cit. ii 72 n. 3; see Acts of the Privy Council (1613-1614) 271-272, 301-302, 370.

[7] Vol. vi c. 7.

[8] 31, 32 Victoria c. 45 § 71; 3 George IV. c. 41 § 2.

On the other hand, the statutes which required English merchants to use English ships were not strictly enforced in the latter part of the sixteenth and in the beginning of the seventeenth centuries. Under Burghley's influence the government "was more careful to encourage English merchants than to limit them entirely to English ships."[1] It was seen that a strict enforcement of these statutes would mean a diminution in the amount of England's trade; and that this would hinder the expansion of the customs revenue, and the growth of native manufacturers. James I., on the other hand, took some measures to enforce these Acts;[2] and, as the century proceeded, the growth of the plantations and the encroachments of the Dutch called attention to the need to secure for English ships the Plantation trade—Charles I. in 1637 forbade the governor of Virginia to trade with Dutch ships.[3] In 1651 it was clear that the Dutch had secured the largest part of the carrying trade; and England felt herself threatened by the growth of their sea power. It was with the object of capturing this trade and of so undermining their sea power that the old policy was revived by the Navigation Acts of 1651 and 1660.[4]

These were the chief but by no means the only measures by which, throughout this period, the navy and the shipping interests were encouraged. It is quite certain that the Crown had the power to impress mariners for the navy. The statutes of the Long Parliament which provided for their impressment practically assume this.[5] There is no recital in them that impressment is contrary to the liberty of the subject; and that they would have contained such a recital, if Parliament had thought the practice illegal, is clear from the fact that it carefully inserted it in the one temporary Act which it passed to render legal impressment for the army.[6] There can be no doubt that the reasoning and the conclusion reached by Foster in *Rex* v. *Broadfoot*[7] are historically sound.

[1] Cunningham, op. cit. ii 73, 74, "The merchants of the Staple and the Merchant Adventurers were exempted from the operation of the Navigation Act of 1559, at the time of their regular shippings; if the higher rates it imposed on goods sent in foreign ships had reduced the volume of trade at these seasons, there might have been a serious reduction in the customs, and an inconvenient restriction of manufacturing. Cecil appears to have taken the far-seeing view that there was comparatively little to be gained by competing with foreigners for existing commerce, and that the wisest course was to open up new markets;" cp. ibid 70, 71; but the law was at intervals enforced; thus in 1588 there was an order that the custom house officials should see that English goods were only shipped in English ships manned by English crews, Dasent xvi 1.

[2] Cunningham, op. cit. ii 210 n. 6.

[3] Ibid 211.

[4] Vol. vi c. 7.

[5] 16 Charles I. cc. 5, 23, 26.

[6] Ibid c. 28, "Whereas by the laws of this realm none of his Majesties subjects ought to be impressed or compelled to go out of his country to serve as a souldier in the wars except in case of necessitie of the sudden coming in of strange enemies into the Kingdome or except they be otherwise bound by the tenure of theire lands or possessions."

[7] (1743) 18 S.T. 1323; cp. Hale, P.C. i 671-679.

Discipline was provided for by statutes passed to render more severe, and to give a wider application to, the law against the desertion of soldiers and sailors.[1] The safety of the mercantile marine was provided for by the enforcement of Henry VIII.'s measures for the suppression of piracy, and for the preservation of harbours and the erection of beacons;[2] and in the interests both of the navy and of merchant shipping, Acts were passed to encourage the growth of hemp and flax,[3] to ensure the honest manufacture of sailcloth,[4] to ensure the preservation of timber fit for ship building,[5] and to encourage the importation of boards fit for the manufacture of casks.[6]

Similarly the government took care to encourage any other industries which were necessary or useful to the army or navy, and to discourage all practices which seemed harmful to the national safety. The sale of horses out of the kingdom—a practice prohibited by the crown from the days of Athelstan[7]—was, during this period, prohibited by several statutes;[8] and throughout the sixteenth century there was much legislation directed to secure an adequate supply of bows. Bowstaves must not be exported by aliens nor used by them without licence;[9] and provision was made for encouraging their import.[10] But even when these statutes were passed the importance of the bow was declining. In the earlier part of the sixteenth century crossbows and handguns had been discouraged in the interests of archery;[11] but the progress of the handgun can be seen from the fact that a statute of 1541-1542 allowed its use at the butts.[12] As the century advanced, the maintenance of an adequate supply of materials for the manufacture of ordnance and gunpowder became the chief object of the govern-

[1] 18 Henry VI. c. 19; 7 Henry VII. c. 1; 3 Henry VIII. c. 5; 2, 3 Edward VI. c. 2; 4, 5 Philip and Mary c. 3; 5 Elizabeth c. 5; cp. The Case of Soldiers (1601) 6 Co. Rep. 27a.

[2] 8 Elizabeth c. 13; Acts of the Privy Council (1613-1614) 142-143—A rebuke addressed to the Mayor of Newcastle for allowing the Tyne to become unfit for navigation; below 351-352.

[3] 24 Henry VIII. c. 4.

[4] 1 James I. c. 24.

[5] 35 Henry VIII. c. 17; 1 Elizabeth c. 15; 23 Elizabeth c. 5; 27 Elizabeth c. 19 § 1; Acts of the Privy Council (1613-1614) 107-108—one reason for the new plantation in Munster.

[6] 35 Elizabeth c. 11.

[7] L.Q.R. xxxvii 426, 434-436.

[8] 11 Henry VII. c. 13 § 1; 22 Henry VIII. c. 7; 1 Edward VI. c. 5; 5 Elizabeth c. 19; see above 299 n. 7 for the proclamations on this subject.

[9] 3 Henry VIII c. 3 §§ 4, 5; 6 Henry VIII. c. 2.

[10] 6 Henry VIII. c. 11 modifying 1 Richard III. c. 11; 13 Elizabeth c. 14. confirming 12 Edward IV. c. 2; cp. Dasent i 192, 195, 196 (1541)—a complaint that the Hanse charges too much for bowstaves imported, and an order fixing a reasonable price; ibid xv 425-426 (1587)—certain enclosures at Norwich were alleged to leave no ground for shooting, "A thing," says the Council, "greatly to be regarded and favored to the musteringe and trayninge of souldiers."

[11] 19 Henry VII. c. 4; 3 Henry VIII. c. 13; 6 Henry VIII. c. 13; 14, 15 Henry VIII. c. 7; 25 Henry VIII. c. 17; 33 Henry VIII. c. 9.

[12] 33 Henry VIII. c. 6 § 6.

ment. "During the reigns of Henry VIII. and Edward VI.," says Mr. Churchill, "when our gunsmiths were learning their business, and when the spoils of the monastic belfries were eagerly sought after by French and Flemish founders, Parliament forbade the export of bell metal, latten, brass, and copper on no fewer than four occasions."[1] In 1589 the manufacturers of ordnance were obliged to furnish returns of all guns made to the Admiral and the Earl of Warwick, and export was prohibited.[2] Over the production of saltpetre the government assumed complete control.[3] Though the operations of the saltpetre men employed by the crown interfered with the enjoyment of private property, they were pronounced to be legal by the common lawyers,[4] and were not objected to by the House of Commons,[5] because they were felt to be necessary for the defence of the kingdom. We shall see that some of these statutes, which thus regulated trade in the interests of national defence, were rendered more effective by some of the statutes relating to agriculture and to the ordering of society.[6]

(ii) *The maintenance of an adequate stock of the precious metals.*

The measures taken for the production of efficient seamen, and for the supply of commodities useful for national defence, would have been to a large extent nugatory if the government had not been able to command sufficient treasure to procure them easily and quickly upon an emergency. It was obvious that the government must be able to command an adequate supply of the precious metals, if it was to contend on equal terms with foreign governments. From Richard II.'s to Edward IV.'s reign statutes had been passed to prevent their export and to encourage their import.[7] We have seen that Henry VII. did not forget the moral to be drawn from the poverty of the Lancastrian kings.[8] We are not therefore surprised to find that statutes of his reign continued the

[1] L.Q.R. xxxvii 438, citing 21 Henry VIII. c. 10; 28 Henry VIII. c. 8; 31 Henry VIII. c. 7; 2, 3 Edward VI. c. 37.

[2] Dasent xvii 142; Acts of the Privy Council (1613-1614) 427, 437, 487; ibid 446—wood is not to be cut down and used to make ordnance for export; cp. Cunningham, op. cit. ii 58-61.

[3] Ibid 61, 62, 290-292; cp. 21 James I. c. 3 § 10 which exempted the trade in saltpetre from the Act, and so preserved the prerogative of the crown in relation to it.

[4] The Case of the King's Prerogative in Saltpetre (1607) 12 Co. Rep. 12; above 299; below 352.

[5] 21 James I. c. 3 § 10; it was not till 1640 that the trade in gunpowder was freed from all restrictions by 16 Charles I. c. 21—the motive of the act was doubtless largely political.

[6] Below 364, 371-373.

[7] Vol. ii 471; for a good summary of the administrative and legislative measures on this subject see L.Q.R. xxxvii 430-434.

[8] Above 27.

policy of his predecessors. A clause of Edward IV.'s statute, which enacted that alien merchants should employ within the realm all money which they gained by trade, was made perpetual in 1487.[1] Another clause of the same statute, forbidding the export of money, plate, and jewels, was revived for twenty years by a statute of 1488-1489;[2] and the same clause was again revived for a like period by a statute of 1552-1553.[3] This clause was then allowed to drop; but the statute of 1487 remained unrepealed, and was enforced by proclamation in 1600.[4]

The cessation of this type of legislation was due to the fact that it was coming to be seen that its main object could best be obtained by another road. The direct interference with the export of the precious metals was a hindrance to trade. It was beginning to be seen in Elizabeth's reign that, if exports could be encouraged and imports discouraged, there would be a balance in favour of this country which must be liquidated in money. Thus the object of these statutes would be obtained without an undue hindrance to the trader.[5] In fact, just as Burghley, in order to encourage native manufactures, was inclined to relax the strict rules which confined English merchants to English ships,[6] so he was inclined to relax the strictness of the prohibition on the export of the precious metals, because he saw that anything which added to the stock of native products saleable here or abroad, increased the wealth of the country far more rapidly than the mere storing up of treasure.[7] In this respect Spain was somewhat of a warning to England. "While the economic system of Spain was concentrated on the possession of treasure, the English scheme . . . was devised with careful thought for useful commodities of every kind, and was free from any undue hankering after bullion."[8] It is for this reason that the measures designed to promote foreign trade and to encourage English industries become of increasing importance all through this period.

(iii) *The promotion of foreign trade.*

At the beginning of this period foreign trade was, for the most part, in the hands of foreign merchants. The Italian bankers negotiated loans for the king and others. The Genoese, the Venetians, and the Florentines imported foreign manufactured goods.[9] The Hanse occupied an exceptionally privileged posi-

[1] 3 Henry VII. c. 8, confirming 17 Edward IV. c. 1.
[2] 4 Henry VII. c. 23.
[3] 7 Edward VI. c. 6.
[4] Tudor and Stuart Proclamations i no. 907.
[5] Cunningham, op. cit. ii. 176, 177.
[6] Above 329.
[7] Cunningham, op. cit. ii 61-63.
[8] Ibid ii 62.
[9] Ibid i 424-426; for some references to foreign loans in the earlier part of this period see Dasent i 193, 227 (1545); i 395, 488-490 (1546); iv 27 (1552); v 195 (1555).

tion.[1] But, in the latter part of the sixteenth century, the rise of the company of Merchant Adventurers and other trading companies shows that Englishmen were beginning to take into their own hands the foreign trade of the country.[2] Elizabeth found it easy to borrow from her own merchants;[3] for they had begun to share in those larger financial operations from which, to use Scaccia's apt comparison, like modern alchymists, they seemed to draw wealth from the mere circulation of paper.[4] The famous Sir T. Gresham is credited with the feat of delaying the start of the Spanish Armada for a year by a successful corner in bills on the bank of Genoa;[5] and it was he who was mainly instrumental in procuring the expulsion of the Hanseatic merchants and the closing of the Steelyard—their factory in London—in 1578.[6] Both Parliament and the crown encouraged this elimination of alien influences. It found expression both in statutes[7] and administrative acts; and, at the beginning of the seventeenth century, some of the methods employed to forward this policy were beginning to raise important questions of public law.

The methods employed by Parliament and the crown to promote foreign trade involved a careful regulation of exports and imports. This regulation took three main forms. In the first place there are a large number of statutes which regulate the conditions of the export and import trade with a view to the encouragement of native manufactures; in the second place the crown, acting partly by the authority of statutes, and partly by its prerogative over foreign trade, regulated the tariff with the same object; and in the third place colonization was encouraged.

(*a*) The general principle which runs through the mass of statutes which regulate the export and the import trade is the

[1] Below n. 6. [2] Above 319-320.

[3] Cunningham, op. cit. ii 147, 148.

[4] Scaccia, Tractatus de commerciis et cambio § 1 Quæst. ii 22, 23, "Et dulce et leve est mercatoribus, cum ex illius occupationibus et ratiociniis lucrum quæstumque hauriant, cujus lucrari causa cambiorum negotiationem tanquam novi alchymistæ invenerunt. . . . Illi (the old alchymists) crosolis, furnis, follibus, aliisque fallacibus instrumentis ex vero auro et argento fumum, ventum, et flatum colligunt, ibi brevissimis circularibus litteris ex fictis marcharum scutis veros aureos scutos conficiunt."

[5] Burnet, History of My Own Time (ed. 1823) i § 313, cited Cunningham, op. cit. ii 146 n. 5.

[6] Hale, Concerning the Custom of Goods Imported and Exported, Part 3 of a treatise on the Customs in three parts, Harg. Law Tracts 202-208; Cunningham, op. cit. ii 223, 224. A statute of 19 Henry VII. c. 23 had confirmed all their privileges; but, from the latter part of Edward VI.'s reign, the rivalry of the English Merchant Adventurers gradually made their position more difficult and finally procured their expulsion, see Dasent iii 487 (1551-1552); x 300-302 (1578); xi 31 (1578-1579); xiii 226, 317, 322 (1581); xvi 77-87 (1588); xxvii 238, 257 (1597-1598); cp. J. B. Williamson, Foreign Commerce of England under the Tudors 48.

[7] Thus the duties payable by aliens were generally higher; see e.g. The Tunnage and Poundage Act of 1 James I. c. 33 §§ 2 and 3.

encouragement of manufactured exports, and the discouragement both of the export of raw material and of the import of foreign manufactured goods.[1]

The wool trade was the most important branch of trade in the Middle Ages and all through this period. The series of statutes which encouraged the exportation of wool in a manufactured state had begun in Edward IV.'s reign;[2] and Edward IV.'s statute was confirmed and extended by statutes of Henry VII.'s and Henry VIII.'s reigns.[3] Sales of raw wool for export (except to the merchants of the Staple) were forbidden until the native demand had been satisfied, and native brokers were subjected to penalties if they bought wool on behalf of merchant strangers.[4] Out of regard to the worsted makers of Norfolk a statute of 1514-1515 forbade entirely the export of Norfolk wool.[5] In 1551-1552, owing to the high price of wool, a statute was passed forbidding all sales except to manufacturers and merchants of the Staple, and forbidding the owners of wool to hold back their stock.[6] Statutes of Elizabeth's reign forbade the exportation of unwrought cloth,[7] and the importation of cards used in the manufacture of wool.[8]

We can see the same idea in many other statutes relating to other commodities. In 1529 there was a prohibition of the export of copper because its dearness was injurious to the native workman;[9] and in 1541 and 1548 this prohibition was extended to all metals except tin and lead.[10] A statute of 1562 recited that "by reason of thabundance of forreyne wares brought into this Realme from the partes of beyonde the Seas, the Artificers are not onely les occupied and therby utterly impoverished, the youthe not trayned in the said Seyences and Exercises. . . . But also divers Cities and Townes . . . muche thereby impayred, the whole Realm greatly endomaged, and other Countreys notablye enryched;" and went on to enact that a long list of foreign ready-made goods specified in the statute should not be imported.[11] As early as Henry VII.'s

[1] See e.g. 3 James I. c. 11, when it is pointed out that it is better to export beer—the manufactured product—than barley the raw material.

[2] 7 Edward IV. c. 3.

[3] 3 Henry VII. c. 11—in order to set the poor commons on work clothes must be "barbed rowed and shorn" before export; 3 Henry VIII. c. 7; 5 Henry VIII. c. 3; 27 Henry VIII. c. 13; 33 Henry VIII. c. 19; see above 302 n. 9 for some of the proclamations dealing with this subject.

[4] 4 Henry VII. c. 11; 22 Henry VIII. c. 1; 37 Henry VIII. c. 15.

[5] 6 Henry VIII. c. 12.

[6] 5, 6 Edward VI. c. 7.

[7] 8 Elizabeth c. 6.

[8] 39 Elizabeth c. 14.

[9] 21 Henry VIII. c. 10.

[10] 33 Henry VIII. c. 7; 2, 3 Edward VI. c. 37.

[11] 5 Elizabeth c. 7—"Gyrdles, Harnes for Gyrdles, Rapiers, Daggers, Knives, Hiltes, Pommeles, Lockettes, Chapes, Dagger Blades, Handels, Scabberdes, and Sheathes for knives, Saddels, Horsharnes, Styrops, Bittes, Gloves, Pointes, Leather Laces, or Pynnes;" cp. Dasent vii 157 (1564)—a proclamation against importing ready-made wares from the Netherlands.

reign the trade in silk and ribbons had been similarly protected.[1] In 1533-1534 the trade of the binders of books was protected by a prohibition of the purchase of foreign-bound books.[2] The pewterers in the same year complained that those who had learnt the art went abroad and taught foreigners, with the result that much bad stuff was imported, and trade was declining. They procured an Act forbidding the sale of imported wares, forbidding aliens to be apprenticed or to act as pewterers, and declaring that English pewterers who went abroad should be deemed to be aliens.[3] Hatters procured a statute which put the trade in imported hats under severe restrictions;[4] and the cappers induced Parliament to interfere on their behalf by a statute to compel all persons, with very few exceptions, to wear woollen caps on Sundays and holidays.[5] Only manufacturers of leather were allowed to buy it;[6] and it was made felony to carry raw hides out of the realm.[7]

If we compare the number and extent of the industries carried on at the end of this period with those carried on at the beginning, we must admit that these and other measures taken to promote the trade of the country to a very large extent attained their object.

(*b*) In the second place, all through the Middle Ages and right down to the beginning of the eighteenth century,[8] the crown had, by virtue of its prerogative, large powers over foreigners and foreign trade. In fact the regulation of foreign trade was regarded as a branch of the prerogative to regulate foreign affairs which is, even at the present day, nearly as absolute as it was in the sixteenth century. From the earliest times the alien had been subject to rules of law which differed from the common law.[9] He could not claim the rights and liberties of the English subject. In fact the crown was very free to treat him as it pleased.[10] The crown also claimed to be

[1] 1 Henry VII. c. 9, enforcing 2 Edward IV. c. 3; 19 Henry VII. c. 21.

[2] 25 Henry VIII. c. 15, repealing a proviso in 1 Richard III. c. 9; see vol. ii 472 n. 1.

[3] 25 Henry VIII. c. 9.

[4] 1 Mary Sess. 2 c. 11.

[5] 13 Elizabeth c. 19.

[6] 1 Elizabeth c. 9.

[7] 1 Elizabeth c. 10; but in 1587 the curriers were complaining that the statutes allowed unfair foreign competition, Dasent xv 200, 265-266.

[8] See the opinion of Mr. West, counsel to the Board of Trade in 1718, Forsyth, Cases and Opinions on Constitutional Law 223-227; cp. S.P. Dom. (1677-1678) 503-504 for an opinion of Thomas Turner, of which Serjeant Maynard approved, to the effect that the King could grant exclusive rights to trade in countries newly acquired from infidels, and set up courts to administer justice otherwise than in accordance with common law rules.

[9] Bk. iv Pt. ii c. 6 § 3.

[10] The unpopularity of the foreigners is illustrated by the riots which occurred in London on the Evil May Day of 1517, Cunningham, op. cit. i 509-511; and there were similar riots in 1586, ibid ii 81; cf. Select Cases in the Star Chamber (S.S.) i *cxxxviii* 114-118; Dasent xxii 506-508 (1592)—protests by the Londoners against Dutch artisans; xxiv 200 (1593).

able to restrict its own subjects from leaving the kingdom or exporting their goods.[1] As the controller of foreign affairs it had by virtue of the prerogative[2] and by statute[3] powers to enforce any treaties which it pleased to make; and these treaties often dealt with the conditions under which foreign trade could be carried on.

We have seen that mediæval statutes recognized that a large discretion must be left to the crown in these matters.[4] It was an idea which came naturally to an age which accepted the root principle of the mercantile system that all trade should be organized with a view to the maintenance of national power; and the claims made by the crown naturally grew larger as, with the rise of the modern state, trade rivalry tended to become simply a phase of national rivalry. These claims were in substance recognized by the legislature in Henry VII.'s and Henry VIII.'s reigns. Thus in a statute of 1491,[5] it was enacted that, because the Venetians had made a law that no Englishman should load a cargo of Malmsey for England unless he paid a duty of four ducats on the butt, a similar duty should be imposed on merchant strangers importing Malmsey to England. But it was recognized that it would be wise to give the king a free hand to negotiate; and therefore it was provided that "this present Acte endure no lenger than they of Venice shall sette aside the imposicion of the payment of the four ducates aforeseid." The same principle was recognized even more strongly in an Act of 1534,[6] which provided that "the kynge

[1] Cf. Dyer 165b; Bates's Case (1607) 2 S.T. at p. 388 *per* Fleming C.B.; F.N.B. 85a says—"because that every man is of right for to defend the king and his realm, therefore the king at his pleasure by his writ may command a man that he go not beyond the sea or out of the realm without licence; and if he do the contrary he shall be punished for disobeying the king's command. . . . And also the king by his Proclamation may inhibit his subjects that they go not beyond the seas;" Dyer, loc. cit. queries this view of the law; and the judges resolved in 1571 that, in the absence of such prohibition, a man was free to go abroad, Dyer 296a; see also an opinion of Popham C.J. to the same effect cited S.P. Dom. (1677-1678) 107, with which the attorney-general agreed.

[2] Dasent xxi 176, 177 (1591)—a writ to the Chief Baron and the Barons of the Exchequer to surcease an informer's action on a statute of Elizabeth, because a treaty had been made with the Netherlands that both countries should remit the duties imposed; on the other hand, Coke cites a case of 36 Elizabeth in which some French merchants, who complained that legal proceedings taken by some English merchants were contrary to treaty rights, were told by the Council that in these treaties "the laws of either kingdom be excepted," so that they must be interpreted as subject to the laws of the country with which they were made, Fourth Inst. 153, 154.

[3] Vol. ii 473-474.

[4] Ibid 472-473; cf. Hall, History of the Customs Revenue i 272, 273 for instances cited from Parliament Rolls in which the commons recognized the existence of these powers by asking for their exercise.

[5] 7 Henry VII. c. 7.

[6] 26 Henry VIII. c. 10—the Act gives as a reason that without it, "suche leages and amyties as benne concluded and had betwene the kynges Majestie and other foreyn kynges and Princes for the weale and tranquylyte of their Realmes . . .

shall, duringe his lyffe naturall have full power and auctoryte by his proclamacions . . . from tyme to tyme to repelle and make voyde . . . all statutes . . . whiche hathe benne made sithe the begynnynge of the first parliament for the restraynte or lette of anye commodities of the Realme to be conveyed . . . to anye outward parties Realmes . . . or for restraynte or lette of any commodities . . . of outward parties Realmes to be conveyde . . . to the Realme."

It is not surprising therefore to find that the crown considered that it had a prerogative to set impositions in order to give effect to its views as to the maintenance of a proper balance of trade; and that Parliament, at any rate in the earlier part of Elizabeth's reign, was inclined to acquiesce in any fiscal measures of this kind which the crown took to enforce its policy against aliens.[1] Such a prerogative was a part, and a necessary part, of its wide and undefined prerogative over trade of all kinds, and especially over foreign trade. As Fleming C.B. said in *Bates's Case*,[2] "the lessening of custom and impost is much to be guided by intelligence from foreign nations; for the usage and behaviour of a foreign prince may impose a necessity of raising custom of these commodities." In fact if we look at the impositions set upon imported goods during this period we shall see that they were designed not to raise revenue but to regulate trade.[3] Thus in 1558 Mary, being at war with France, prohibited the importation of French wine, and imposed a penalty of 40s. a tun for the breach of this prohibition. This, says Hale, was "not so much an imposition as a bargain for dispensation."[4] At the same time she laid upon sweet wines a duty of 26s. 8d. on the butt. Probably this was due partly to the fact that it was thought desirable, as the statutes show,[5] to discourage the sales of these sweet wines; partly to a wish to carry out the policy of Henry VII.'s statute[6]—prices were rising and it was therefore necessary to increase the custom so as to make it bear the same proportion to the new price as it bore to the old. Elizabeth left the duty on sweet wines as it was, but increased the duty on French wines to four marks on the tun

mought percase be ympeched . . . contrarie to the pactes and agrementes theryn conteyned."

[1] Thus in 1563 Parliament confirmed and assured against aliens (but not against natives) a patent of Mary prohibiting Malmsey from being landed anywhere but at Southampton under penalty of paying triple custom, Hall, Customs Revenue i 135, 136; cf. 23 Elizabeth c. 7 § 3, which enacted that aliens should pay for fish imported, "all such lyke customs and impositions as are or shall be imposed . . . upon anie her Majestie's subjects in those forrein regions . . . from whence the said salted fyshe shal bee shipped . . . over and besydes the ordinarye customes"—clearly this left a large discretion to the crown to set retaliatory duties.

[2] (1606) 2 S.T. at p. 391.

[3] Hall, History of the Customs Revenue i 124-130, 136, 137.

[4] Hale, op. cit. 193. [5] Below 514-515. [6] Above 336.

(which contained two butts) so that the duties on both sorts of wine were made equal.[1]

It is of course clear that these rearrangements of the tariff sometimes involved the imposition of increased customs duties. But it was well recognized that for the purpose of raising revenue these customs duties could not be increased without a Parliamentary grant.[2] How then was the existence of this wide prerogative over trade compatible with the existence of Parliament's rights to control the revenue? The Tudors made so careful a use of their prerogative that this question was never allowed to be publicly raised in this period.[3] But it is clear that if Parliament grows more jealous of its rights, and if this prerogative is wielded by a less diplomatic sovereign, a legal question of first-rate constitutional importance will arise. In fact, as we shall see, it arose just four years after the Tudor dynasty had ceased to reign.[4]

(*c*) In the latter part of the sixteenth century, and all through the first half of the seventeenth century, it is clear that the crown favoured the settlement of Englishmen overseas. All through the sixteenth century many different grants were made to different explorers and adventurers.[5] Henry VII. in 1496 empowered

[1] Dasent vi 305; vii 102; she did not therefore, as is sometimes said, impose a duty on sweet wines, Hall, op. cit. 127-130. Mary did not, as Hakewill said in his argument in 1610 (2 S.T. 453, 454), impose a duty on cloth. The facts are these:—Edward III. placed a tax on cloth imported because it contained wool liable to be taxed, and Richard II. continued the same policy, Hale, op. cit. 165, 175, 176, 177-178. Mary increased the tax on cloth because the tax on wool had been increased; and even after this increase wool exported in the form of cloth paid less than raw wool, Hale, op. cit. 177, 178, 192. In Hale's opinion this tax on cloth was "warranted by the equity of the old customs of wool," ibid 175, 193; and Coke, Second Instit. 62, seems to have been of the same opinion. It appears also that the rates on dry French wares were to be settled by commission, and that 10s. per tun on beer exported was imposed beyond the ordinary customs, Dasent vi 305; of course it must be remembered that England and France were then at war, cf. ibid vii 102.

[2] See Hale, op. cit. 193, citing the case of Germane Ciol; the Case concerning the king's power to restrain traffic and to impose, argued in 1561, Hall, Customs Revenue 133-136; in 1408 the Council told the Venetian consul that the customs regulations could only be altered "by Parliament which had enacted the orders and statutes," Calendar of State Papers (Venetian) i 49.

[3] Hakewill in 1610 (2 S.T. 453, 454) says that the merchants in the first year of Elizabeth's reign questioned the legality of the increased duty on cloth on this ground; as Dyer 165 says, "the merchants of London found great grievance and made exclamation and suit to be unburthened of the impose;" but no judgment appears to have been given, or, if given, it was not published; the case cited by Hallam, C.H. i 317 n. *i* is shown by Hall, Customs Revenue i 130-139 to have very little bearing on the question; it does show however that the judges considered the levy of an extra customs duty pure and simple to be illegal; but the question of the crown's right to regulate tariffs in the commercial interests of its subjects does not appear to have been touched upon—all that was argued was the legality of a prohibition to land at any other place than Southampton, and the assessment of triple custom.

[4] Bates's Case (1606) 2 S.T. 371; vol. vi c. 6.

[5] "It is far from easy to classify the different English maritime expeditions during the second half of the sixteenth century. Some were mainly voyages of discovery, others were intended to open up a foreign trade, as, for instance, the voyages to Russia, to Africa, and to India. In certain cases fleets were fitted out with the avowed object

Sebastian Cabot to discover heathen lands not yet found out by any Christians; and in 1502 he issued a similar grant to two Bristol merchants and others.[1] The incorporation in 1554 of the company called by the enormous name of "The Merchants Adventurers of England for the discovery of lands territories isles dominions and seignories unknown, and not before that late adventure or enterprise by sea or navigation commonly frequented," is the origin of the Russia Company;[2] and in Elizabeth's reign there are many licences to explorers such as Gilbert, Frobisher, Drake, and Raleigh to discover new lands.[3] But permanent settlements were not made before the beginning of the seventeenth century—Gilbert's expedition to Newfoundland in 1583,[4] and Raleigh's expeditions to Virginia and Guiana from 1584 to 1595,[5] had failed. During the first half of the seventeenth century, part of the eastern coast of America, and parts of the West Indies were colonized, either by means of chartered companies, or by means of proprietors to whom the crown made grants. The African company had a factory at Gambia, and the East India Company had factories at Surat, Madras, and Hooghly.[6]

The motives of these very various settlements were various. "Political aims were kept in view in all the schemes for colonizing beyond the Atlantic. It was hoped that these plantations would tend to restrict the over-weening power of Spain in the New World, and might even serve as a basis for attacking it."[7] It was seen too that they afforded an outlet for surplus population;[8] and later it was found that they could be used as places to which criminals or other undesirables could be transported.[9] And these political motives were connected with two different religious motives. The Plantation of Virginia was designed in part to spread the Christian religion;[10] and the later settlements in New England and elsewhere were designed to provide a country in which the settlers could freely worship in their own way.[11] But, as Dr. Cunningham has pointed out, the main impulse towards

of despoiling the Spaniard, and finally, towards the close of the century, expeditions were sent to found or assist plantations," Scott, Joint Stock Companies ii 241.

[1] Carr, Select Charters of Trading Companies (S.S.) xxviii, xxix.

[2] Ibid xxix-xxxiv; Scott, op. cit. ii 36 seqq.

[3] Ibid 241-245; Carr, op. cit. xxxiv-xxxviii.

[4] Scott, op. cit. ii 243. [5] Ibid 244-245.

[6] For a tabular list of the names and dates of the various settlements made by plantation companies, trading companies, or by proprietors, see Cunningham, op. cit. ii 332 n. i; and see generally Scott, op. cit. ii 246-337; Carr, op. cit. lxxxiii-xcii.

[7] Cunningham, op. cit. ii 335.

[8] Ibid ii 344-346.

[9] Ibid ii 348; vol. iii 304; below 398. Bacon did not approve of using colonies for this purpose, Spedding, Letters and Life vi 21.

[10] Cunningham, op. cit. ii 336-338, citing the charter to Virginia granted in 1606.

[11] Ibid ii 339, 341; above 307.

colonization was economic.[1] Capitalists found that they could profitably invest money in the cultivation of the West Indies and the southern parts of North America. The produce thus obtained made Englishmen less dependent upon foreign nations; and English shipping was encouraged. James I. and Charles I. prohibited the import of foreign tobacco and the growth of English tobacco in order to encourage the colonial product;[2] and in order that English shipping might be benefited, the Council foreshadowed the policy of the later Navigation Acts by endeavouring to restrict the Virginia tobacco trade to English ships.[3]

In this period, then, a good start in the direction of colonization has been made. As yet it was developed by the crown and not by the legislature. But both the economic motives which induced the crown to encourage it, and the measures taken to make the colonies a source of economic strength to the mother country, foreshadow the legislation of the following period.[4]

(iv) *The preservation and regulation of industries already established, and the encouragement of the growth of new industries.*

At the beginning of this period England was mainly an agricultural country; and it continued to be mainly an agricultural country till the end of Elizabeth's reign. But, from an early period, the government had been quite alive to the advantages to be gained from fostering native industries, and encouraging the growth of new industries. From the beginning of this period this policy had been actively pursued. In order to preserve industries already established measures were taken to secure skill in the workman and good quality in the manufactured product. In order to encourage the growth of new industries measures were taken to offer inducements to Englishmen and foreigners to set them up in this country. The first set of measures was mainly statutory. The second mainly rested on the prerogative; and just as the manner in which the prerogative of adjusting tariffs was used raised questions of public law, so the manner in which this prerogative was used raised similar questions at a slightly earlier date.

(a) *The measures taken to secure skill in the workman and good quality in the manufactured product.*

The rules and regulations of the mediæval gilds had generally provided for the possession of skill in the workmen by imposing

[1] Op. cit. ii 342.

[2] Above 302; but both James and Charles warned the colonies that the protection given to tobacco was only temporary, and till they could found other industries, Cunningham, op. cit. ii 356-358.

[3] Ibid ii 343 n. 3, 359.

[4] Vol. vi c. 7.

varying terms of apprenticeship.[1] But the decay of the authority of the gilds, and the migrations of industry from the towns, had in some cases rendered the old rules ineffective, and had created a need for general and national regulations. In 1551 the clothiers complained that the merchant adventurers would not give a fair price for their cloth. The answer was, partly that the market was overstocked, partly that the cloth was of bad quality. "As long as everie man that wolde," it was said, "had liberty to be a clothier, as they have nowe, it was impossible to have good cloth made in the rhealme . . . wherefore it was concluded that some devise shulde be had for a lawe that none shulde meddle with cloth making but such as had been prentises to thoccupacion."[2] In fact throughout the earlier part of this century definite terms of apprenticeship had been fixed by statute for particular trades.[3] It was not, however, till 1562-1563[4] that a general statute was passed which not only regulated the conditions of apprenticeship for several of the most important industries of the country, but also attempted to settle the relations between employer and employed, and the relations between the agricultural and manufacturing industries. To the provisions of this statute upon these two latter topics I shall return later. Here I shall deal with the clauses dealing with apprenticeship.

The term of apprenticeship, borrowed from the "custom and order of the city of London," was fixed at seven years;[5] and all contracts of apprenticeship made otherwise than in accordance with this Act were declared to be void.[6] Such contracts were declared to be binding upon minors.[7] Householders in cities and towns corporate, being over the age of twenty-four, and "using or exercising any art, mystery, or manual occupation," were allowed to take as apprentices the son of any freeman, provided he was not occupied in husbandry or a labourer.[8] Householders in market towns not corporate were allowed, under similar conditions, to take as apprentices the children of other artificers.[9] Different provisions were made for those "exercising any of the mysteries or crafts of a merchant trafficing by traffic or trade into any parts beyond the sea, mercer, draper, goldsmith, ironmonger, embroiderer, or clothier that doth or shall put cloth to making or sale." They could only take as apprentices their sons or the

[1] See on the whole subject of the older rules, and their relation to the Act of Elizabeth and later practice, Some Aspects of Early English Apprenticeship, by Miss Dunlop, Royal Hist. Soc. Tr. (Third Series) v 193-208.

[2] Dasent iii 19, 20 (1551).

[3] E.g. 5 Henry VIII. c. 4 (worsted), made perpetual 25 Henry VIII. c. 5; 5, 6 Edward VI. c. 8 (woollen cloth), and c. 24 (hats); 2, 3 Philip and Mary c. 11 § 7 (weavers); 1, 2 Philip and Mary 2 c. 14 § 2.

[4] 5 Elizabeth c. 4. [5] §§ 19 and 24.

[6] § 34. [7] § 35. [8] § 19. [9] § 21.

children of those who had land to the yearly value of forty shillings, if the master was resident in a city or town corporate, or to the yearly value of £3 if he was resident in a market town.[1] For certain other trades this property qualification in the parent of the apprentice was not required.[2] For cloth weavers the property qualification of the parents was, with certain exceptions, always to be £3.[3] Powers were given to the officers of cities and towns to compel suitable persons, if minors, to bind themselves apprentices; and the justices of the peace were given large powers to settle differences between master and apprentice, and to discharge apprentices.[4] It was, however, mainly through the machinery of the older gilds and newly constituted companies that the measure was enforced; and it was to their efforts that it owed its success.[5] Its working gradually diffused throughout the country the custom of a seven years' apprenticeship, which lasted till the legislation of the early years of the nineteenth century;[6] and, though the fact that it was administered by the established authorities in each particular trade may have modified in practice some of the provisions of the Act,[7] it ensured an intelligent administration of the Act as a whole, because it was largely founded on the older rules and practices familiar to these authorities.

As with the training of the workmen, so with the quality of the article produced, the mediæval gild regulations had ceased to be effective. But it was clear that, if trade internal and external was to thrive, some provision must be made for compelling manufacturers to manufacture honest wares. The statutes which attempted to secure this object dealt with most of the important industries of the country. They included, for instance, the trade in cloth,[8] leather,[9] shoes,[10] hats,[11] worsted,[12] linen,[13] upholstered

[1] §§ 20, 22.

[2] § 23. Smith, wheelwright, ploughwright, carpenter, rough mason, plasterer, sawyer, limeburner, brickmaker, bricklayer, tyler, slater, healyer, tile maker, linen weaver, turner, cooper, miller, earthen potters, woollen weaver weaving housewife's or household cloth only and none other, cloth fuller, thatcher, or shingler.

[3] § 25. [4] § 28.

[5] Royal Hist. Soc. Tr. (Third Series) v 203, 204.

[6] Cunningham, op. cit. ii 35, 658-661; 54 George III. c. 96.

[7] E.g. though apprenticeship was, according to the statute, the only way by which a man could enter a trade, the companies very generally recognized also the right of patrimony, i.e. that the eldest son should be entitled to freedom of the trade on attaining twenty-one, and generally on payment of lower fees, Royal Hist. Soc. Tr. (Third Series) v 206, 207.

[8] 3 Henry VIII. c. 6; 27 Henry VIII. c. 12; 3, 4 Edward VI. c. 2; 5, 6 Edward VI. cc. 6 and 22; 8 Elizabeth c. 12; 35 Elizabeth c. 10; 39 Elizabeth c. 20; 43 Elizabeth c. 10; cf. 3 James I. c. 16; 4 James I c. 2; 7 James I. c. 7; 21 James I. c. 9 (Wales); 21 James I. c. 18.

[9] 19 Henry VII. c. 19; 3 Henry VIII. c. 10; 24 Henry VIII. c. 1; 2, 3 Edward VI. c. 11; 1 Elizabeth c. 9; 5 Elizabeth c. 8; 1 James I. c. 32—an elaborate act which repealed 5 Elizabeth c. 8; 4 James I. c. 6; 7 James I. c. 16.

[10] 1 Elizabeth c. 8; 5 Elizabeth c. 8. [11] 8 Elizabeth c. 11; 1 James I. c. 17.

[12] 5 Henry VIII. c. 4. [13] 1 Elizabeth c. 12.

goods,[1] coverlets,[2] cables,[3] barrels,[4] articles made of pewter,[5] pins,[6] wax,[7] and the dyeing[8] and painting industries[9]; and they often conferred enlarged powers upon the companies entrusted with the supervision of the particular industry. The earlier statutes were perhaps passed with an eye chiefly to the interests of the English consumer, and the internal trade of the country. But in Elizabeth's reign and later they were passed quite as much with the object of encouraging the consumption of English manufactured goods by foreigners, and of thus increasing the export trade of the country.[10] We have seen that one of the advantages of confining foreign trade to the regulated or joint stock companies was the supervision which they were able to exercise over the quality of the goods exported. They helped, it was argued, to maintain the reputation of English goods in foreign markets.[11]

(b) *The measures taken to encourage the growth of new industries.*

It was only very occasionally that Parliament intervened to encourage the founder of a new industry by the grant of statutory privileges. Perhaps the only instance is to be found in a statute of 1554.[12] The statute recites that certain citizens of Norwich, at their great costs and charges, had introduced the manufacture of satins and fustians of Naples; and that consequently those articles were sold at cheaper rates than in foreign countries. It then enacts that these persons shall be incorporated as a fellowship, with the right to choose wardens to survey the manufacture (which is to be carried on only at Norwich), and to make ordinances for the same. The usual method by which this object was effected in the latter part of the Tudor period was the grant of a patent of monopoly; and therefore of the history of these monopoly patents I must say a few words.[13]

[1] 11 Henry VII. c. 19; 5, 6 Edward VI. c. 23.
[2] 34, 35 Henry VIII. c. 10.
[3] 21 Henry VIII. c. 21.
[4] 23 Henry VIII. c. 4.
[5] 25 Henry VIII. c. 9.
[6] 34, 35 Henry VIII. c. 6.
[7] 23 Elizabeth c. 8.
[8] 24 Henry VIII. c. 2; 23 Elizabeth c. 9.
[9] 1 James I. c. 20.
[10] E.g. 23 Elizabeth c. 9 recites that cloth has been dyed with logwood, and that cloth so dyed is sold not only "to the great deceit of the Queen's loving subjects within this her realm England, but also beyond the seas, to the great discredit and slander as well of the merchants as of the dyers of this realm;" and cf. 7 James I. c. 14—the trade of the horners; for other instances see above 326 n. 1; cf. Dasent ix. 221 (1576)—an order as to frauds in the manufacture of cloth which are bad for trade; ibid xxxi 387-389 (1601).
[11] Above 320; Cunningham, op. cit. ii 239, 240.
[12] 1, 2 Philip and Mary c. 14; L.Q.R. xii 144, 145.
[13] On this topic see generally Hulme, History of the Patent System, L.Q.R. xii 141, xiii 313; Scott, Joint Stock Companies i chap. vi; Carr, Select Charters of Trading Companies (S.S.) lv-lxxxi.

From the earlier half of the fourteenth century there are signs that the crown was alive to the advantages which would accrue from the establishment of native manufactures. Wool was the staple commodity produced at this period; and the quality of the English wool made it as indispensable to the manufacturing cities of Flanders and Italy as Welsh coal was to foreign navies before the introduction of oil fuel.[1] Thus it is not surprising to find that the earliest attempts to establish native manufactures were in connection with wool. In 1331 the king granted to John Kempe of Flanders and his companions letters of protection in consideration for teaching his subjects their methods of weaving, and promised to all other weavers, dyers, and fullers who came to England from abroad with the same object the same protection;[2] and this grant was confirmed by statute.[3] Throughout the fourteenth and fifteenth centuries there are instances of similar grants in favour of the woollen and other industries;[4] and statutes of Henry VI.'s and Edward IV.'s reigns, which were passed to encourage the native producer by prohibiting the importation of certain ready-made wares,[5] perhaps show that this policy was not altogether unsuccessful. The validity of such grants, if it could be shown that they were clearly for the welfare of the realm, was recognized by the mediæval lawyers.[6]

[1] Thus in 1490 the Venetians were much perturbed because the Florentines were urging the king of England to establish a wool staple at Pisa, see Calendar of State Papers (Venetian) i 185.

[2] E. W. Hulme, History of Patent System, L.Q.R. xii 142.

[3] 11 Edward III. c. 5, "All cloth workers of strange lands, of whatsoever country they be, which will come into England, Ireland, Wales, and Scotland, within the king's power, shall come safely . . . and shall be in the king's protection and safe conduct, to dwell in the same lands, choosing where they will; and to the intent that the said Clothworkers shall have the greater will to come and dwell here, our sovereign lord the king will grant them franchises as many and such as may suffice them."

[4] L.Q.R. xii 143; Carr, Select Charters of Trading Companies (S.S.) lvi.

[5] Vol. ii 471-472.

[6] Y.B. Ed. III Pasch. pl. 8 (ff. 17, 18), "Et issint *nota* que artificers ou sciences queux sont pur le publike bien, sont graundement favore en le ley etc. Et auxy le Roy come chiefe gardain del common wele ad power et auctority per son prerogative, de graunter mult des privileges par le pretence d'un publike bien, comment que (*prima facie*) il appiert merement encontre comen droit;" but if clearly contrary to public policy they would not be upheld, see e.g. R.P. 50 Ed. III. no. 33 (ii 328), where the grant of the sole right to one Peachey to sell wine in London was treated as clearly illegal, and his conduct in acting under it was made one of the articles of his impeachment; it is clear from the Y.B. cited, and from Y.B. 2 Hy. V. Pasch. pl. 26 (vol. ii 468 n. 3) that the judges regarded as contrary to public policy contracts and special privileges which imposed restraints on trade unknown to the common law; it is true that many of the privileges which had been conferred on the boroughs by royal charter often operated to restrain trade; but these grants were hallowed by time and recognized by the law; moreover they were intimately bound up with the jurisdictional and governmental privileges of the boroughs, and were therefore regarded as standing on a different footing, below 346 nn. 1 and 3.

We occasionally meet with similar grants in the early part of the sixteenth century.[1] But during this period the Tudors seem to have adopted the plan of "entering into secret negotiations for the purpose of attracting skilled foreigners into its own service." Instances are "the introduction of German armourers, Italian shipwrights and glass makers, and French ironfounders."[2] It was not till 1561 that the new system of granting "industrial monopoly licences" was introduced. It is to this system we must look for the origins of our modern patent law.

The earliest instances of these industrial monopolies are, as we might expect, to be found in Italy. They were known in Venice about the year 1500, and followed, Mr. Hulme says, "close upon the heels of printers' copyrights." From Italy they were introduced into the Netherlands, and from thence into England.[3] It was a naturalized Italian, by name Acontius, who first suggested the adoption in this country of this method of rewarding inventors.[4] The essence of these grants of industrial monopoly licences was this:—In return for the introduction of a manufacturing process, formerly unknown in this country, the introducer was granted a monopoly of using that process for a specified length of time. The aim was to introduce into this country "those industries the products of which had hitherto figured most prominently on the lists of imports."[5] Hence there are often clauses aimed at binding the grantee to introduce his process within a fixed period, to employ and teach English subjects, and sometimes to manufacture a certain minimum quantity within a given period.[6] The grant did not create a monopoly of selling, but of manufacturing the product. It is not till much later that the exclusive right of sale comes to be regarded as the essence of the grant.[7]

These grants differed from the mediæval privileges granted to boroughs and gilds, and confirmed by later charters, in two

[1] Dasent ii 109 (1547)—an importation of foreign weavers, "which shuld teach men the art of making poldavies;" ibid iii 415, 509-510 (1551)—foreign worsted makers introduced at Glastonbury by the Protector Somerset.

[2] L.Q.R. xii 144; James I. said in his Basilicon Doron, Works 164, "take example by England, how it hath flourished both in wealth and policie, since the strangers craftsmen came in among them: therefore not only permit, but allure strangers to come here also; taking as strait order for the repressing the mutining of ours at them, as was done in England, at their first bringing there."

[3] Ibid xvi 44.

[4] Ibid xii 148, 151; Carr, op. cit. lvii.

[5] L.Q.R. xii 152, 153.

[6] Ibid xiii 314; Carr, op. cit. lviii, lix.

[7] L.Q.R. xii 153, "the exclusive right of sale, which is supposed to be the kernel of the patent grant, is in point of fact subsequent to and derived from the sole right of manufacture. . . . With the exception of the grant to Verselyn, who obtained an exclusive control over the Venetian glass trade, the rights of the foreign merchant and the discretion of the buyer in the home markets were left absolutely unaffected by the terms of these grants, which, accordingly, must be considered as manufacturing and not as commercial privileges."

important respects. In the first place the privileges granted to these boroughs and gilds were commercial rather than manufacturing privileges.[1] In the second place they represented the mediæval order of political and commercial ideas, according to which the details, both of local administration and of the ordering of trade, was the affair of self-governing communities.[2] The lawyers expressed an historical truth in technical form when they ruled that, though these privileges would have been invalid if newly granted by royal charter, they could be justified by custom.[3]

These grants also differed from the mediæval grants of special privileges to those who introduced a new industry,[4] in that they created a monopoly; and as the system developed, they came to differ from them in another important respect. In the middle ages the crown made the grant and kept the privileged industry under its sole control. Under the new system the patentee applied for the grant, and, having got it, was left free to act under the powers conferred by it.[5]

This latter distinction began to be important when the monopoly system began to be abused by the grant to persons, who had introduced nothing new into the country, of all kinds of commercial privileges, oppressive powers to enforce these privileges, and dispensations from the existing law. When, under the older system, the crown made a grant for the purpose of establishing a new industry, and kept that industry under its own control, it might be contended that it was for the crown alone to decide not only what grants should be made, but also any disputes which arose from the acts of the grantee in pursuance of the grant. But when these extensive and miscellaneous grants were made to private persons on their own application, and when these private persons abused the powers conferred on

[1] L.Q.R. xii 153 n. 1; Darcy v. Allin (1602) Noy at p. 182, "it is a monopoly *cum penes vestrum potestas vendendi sit*. But when there be many sellers, although they be all free of one company, as goldsmiths, clothiers . . . and such like who have settled governments, and wardens and governors to keep them in order, they were never accounted a monopoly, which the statute anno 5 Eliza. in some sort proved, because in many of these trades all persons are prohibited to use the same, but onely such as have served in the same trade seven years as an apprentice."

[2] Vol. ii 403-404.

[3] City of London's Case (1610) 8 Co. Rep. at p. 125a, "It was resolved that there is a difference between such a custom (that no foreigner shall keep a shop or use a trade in London) within a city, and a charter granted to a city to such effect; for it is good by way of custom, but not by grant; and, therefore, no corporation made within time of memory can have such privilege, unless it be by Act of Parliament."

[4] Above 344.

[5] L.Q.R. xii 151, "With the acceptance by the Crown of the Monopoly policy advocated by Acontius in 1559, the responsibility for the introduction of new industries was by a gradual process of devolution shifted from the Crown to the patentee, upon the faith of whose representations the grant was both drawn and issued."

them, those who suffered naturally wished for a better remedy than an appeal to the authority from which they had emanated.

Of the magnitude of the evils caused by these inconsiderate grants to all classes of the community there can be no question.[1] Hindrance to trade and manufacture, high prices, inferior goods, and all kinds of oppression were the natural consequence. And, while court favourites were rewarded by patents which enabled them to control the manufacture of or the trade in the common necessaries of life, really meritorious inventors were unable to obtain protection.[2] Mr. Hulme's analysis of the grants submitted to the committee of grievances in 1601 shows that there were fifteen dispensations, "including licences (*a*) to traffic in forbidden articles, (*b*) to perform acts prohibited by penal statutes, and (*c*) offices delegating to an individual the dispensing power of the crown in respect to a given statute;" that there were seven copyright patents; and that there were seven industrial monopolies.[3] All these patents having been granted by the crown, were protected by the prerogative; and those who protested were regarded by the Council and Star Chamber as wanting in proper respect to the queen.[4] Even members of Parliament were rebuked in 1571 for questioning them.[5] But in 1597 the prevalent industrial depression caused renewed attention to be drawn to them. The queen in dismissing the Parliament said that she hoped that her subjects would not take away her prerogative, and promised that all the patents should "be examined and abide

[1] Even the Council seemed inclined to think that certain complaints of the salt monopoly might be justified, Dasent xiv 395 (1586-1587); but in 1591 this monopoly was upheld, Dasent xx 37, 38; on the other hand, Dr. Scott, Joint Stock Companies i 107-119, seems to regard the complaints as to monoplies made by Parliament as being for the most part without foundation, though he admits that there were abuses in the user of the powers given by them; but we cannot quite disregard either the unanimous or almost unanimous opinion of the House of Commons, or the statements made in the case of Darcy v. Allen, below 349, or in the Case of Penal Statutes, below 358-359.

[2] L.Q.R. xvi 53, 54.

[3] Ibid 54; cf. Scott's analysis, Joint Stock Companies i 108-117. We meet with a monopoly of sowing woad in Dorset, Dasent xxii 81 (1591); of making paper of linen rags, granted to the Queen's jeweller, ibid xxii 374 (1592), xxix 106 (1598); of starch, ibid xxiii 45 (1592); of train oil, xxx 443 (1600); sale of foreign pottery—the custom house officials are to help to maintain it, xxxi 300 (1601); cf. Martin, History of Lloyd's 36-41, and Pt. II c. 4 III for the controversy as to a patent granted to one Candler in 1574 for the sole registration of insurances and other mercantile documents.

[4] See e.g. Dasent xi 155 (1579)—the authorities of the City of London had seized glass belonging to the grantees of the glass monopoly as "foreign bought" in accordance with their franchise, and they were ordered to restore it; xii 246 (1580)—President of the Council of Wales to see that the wine monopoly is not infringed; ibid 337—infringements of the glass monopoly; xiii 157 (1585)—the Vintners' monopoly to sell wine; xvii 168 (1589)—reference to the Council of Raleighs' monopoly for the licensing of taverns; xxv 115-117, xxvii 325, xxviii 592—the mineral and battery works patent.

[5] D'Ewes 151.

the trial and true touchstone of the law."[1] But very little seems to have been done, and, in at least one case, an action at common law, in which the validity of one of these patents would have come into question, was stayed.[2]

In 1601 the House of Commons again took up the question; and this time it was found impossible to shelve the discussion. A bill dealing with the matter was introduced; and it is clear from the debates upon it that it raised all sorts of questions as to the power of the crown to make these grants and dispensations, and to grant privileges to trading companies; and that it even raised questions as to the nature of the prerogative and its relation to the law.[3] "Two great things," said Cecil,[4] "had been drawn in question: first the Prince's power; secondly the freedom of Englishmen." And it was inevitable that these questions should be raised. Those aggrieved by these patents had long thought, and thought with some justice,[5] that the common law did not warrant these infringements of liberty to trade, from which the public not only drew no advantage, but were actually damaged.

Such questions as these the Tudors had always managed to evade. But now popular feeling both in and out of Parliament was running so high that it seemed impossible to pursue this policy of evasion.[6] Elizabeth achieved the seemingly impossible when she secured the abandonment of the bill by a promise to leave the validity of the patents to the judgment of the common law.[7] She never won a greater diplomatic triumph. By abandoning her claim to settle by the prerogative all questions relating to these grants, she shifted the odium which arose from their abuse from the prerogative to the patentees;[8] and, at the same time, as the discussions in the law courts must turn to a large extent upon the facts of individual cases, far-reaching Parliamentary discussions of the nature of and the limitations upon

[1] D'Ewes 547; cf. Carr, Select Charters of Trading Companies lxv; Scott, op. cit. 105-106.

[2] Carr, op. cit. lxvi; below 349 n. 2.

[3] D'Ewes 644-650, 652-654. [4] Ibid 649.

[5] Above 344 n. 6; cf. the precedents cited in Noy's Rep. at pp. 182-183; Co. Third Instit. chap. lxxxv; as early as 1577 it appears that the Queen's Bench and Common Pleas had been releasing those imprisoned for infringing the monopoly of the Spanish Company, which had called forth an order from the Council to desist, Dasent x 37-38.

[6] Cecil said in his speech, D'Ewes 653, "I have heard myself, being in my coach, these words spoken aloud, God prosper those that further the overthrow of these monopolies, God send the prerogative touch not our liberty."

[7] "That further order should be taken presently and not *in futuro* . . . and that some should be presently repealed, some suspended, and none put in execution, but such as should first have a tryal according to the law for the good of the people," the Speaker's account of Elizabeth's message to Parliament, D'Ewes 652.

[8] "Against the abuses her wrath was so incensed, that she said that she neither could nor would suffer such to escape with impunity," D'Ewes 652.

the royal prerogative were avoided. The prerogative remained with no new statutory limitations imposed upon it.

The common law was thus called upon to settle a delicate constitutional question,[1] of vital importance to the trade of the country. It arose for discussion in connection with Darcy's patent for the importation of playing cards, which had for many years been maintained by the Council with much difficulty.[2] As late as 1603 actions against Darcy were prohibited.[3] But the common law courts got their opportunity when Darcy himself took the offensive and sued Allen for infringing his patent.

The importance of the case is evidenced by the fact that it is reported by three reporters—Coke,[4] Moore,[5] and Noy.[6] The facts upon which the action arose were as follows:—The queen had granted the sole right of importing playing cards to Bowes. Afterwards she made a similar grant to the plaintiff. The defendant, a haberdasher of London, sold cards in contravention of this grant. The plaintiff brought an action on the case against him. The defendant demurred, and the court upheld the demurrer. All the judges were unanimously of opinion that a monopoly was prima facie against the common law, statute law, and the liberty of the subject. "The sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees; and although provisions and cautions are added to moderate them . . . it is mere folly to think that there is any measure in mischief and wickedness: and, therefore there are three inseparable incidents to every monopoly against the commonwealth, i.e. (1) that the price of the same commodity will be raised . . . (2) the second incident . . . is, that after the monopoly granted, the commodity is not so good and merchantable as it was before . . . (3) it tends to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families, who will now of necessity be constrained to live in idleness and beggary."[7]

[1] Dodderidge, arguing for the defendant in Darcy v. Allen, "dit que le case fuit tender concernant le prerogative del prince et liberty del subject, et duissoit estre argue ove bone caution," Moore at p. 672.

[2] Dasent x 434-435 (1578); xi 172 (1579), 430 (1580); xviii 186 (1589); xxxi 55, 333-336 (1600-1601); ibid 346-348, xxxii 237 (1601)—an action at law stayed; xxxii 497 (1603)—a similar order.

[3] Ibid xxxii 497; cf. Carr, op. cit. lxvi.

[4] The Case of Monopolies (1602) 11 Co. Rep. 84b-88b.

[5] Darcy v. Allen, Moore K.B. 671-675.

[6] Darcy v. Allin, Noy 173-185—this is a report of Fuller's argument for the defendant; for a critical account of the case see Gordon, Monopolies by Patent 193-232.

[7] 11 Co. Rep. at pp. 86a, 86b.

The court followed the principles of the mediæval common law that prima facie trade must be free, and that that freedom could only be curtailed by definite restrictions known to and recognized by the common law.[1] But it is hardly necessary to say that freedom of trade did not mean to Coke and his fellows what it means to an economist or a politician of to-day. The freedom they meant was freedom from arbitrary restraints not recognized by the law; but this was quite consistent with considerable restrictions of that freedom whenever it was desirable in the interests of the state that it should be restricted.[2] In fact the attitude of the courts to the maintenance of the freedom of trade was somewhat analogous to their attitude to the maintenance of the freedom of alienation. In both cases freedom was the rule. In both cases no individual caprice should be allowed to interfere with that freedom. But in both cases public policy demanded that the law should permit exceptions. We have seen that the mortmain laws represented one of these exceptions to freedom of alienation:[3] we shall see that the growth of the rule against remoteness of limitation represented another.[4] Similarly the powers of the chartered boroughs, and the prerogatives of the crown to act for the commercial interest of the nation represented limitations upon the freedom of trade, which in the interests of public policy, the law recognized. Now if these principles were applied to these grants of monopoly, it is clear that some of them were wholly indefensible. It was contrary to public policy that prices should be raised, that the quality of goods should be deteriorated, and that workmen should be thrown out of work merely to benefit a favoured individual. On the other hand, others were defensible on the ground that the crown in making them was acting in the commercial interests of the nation.

It would appear from the reports of *Darcy* v. *Allen*, from other cases, and from the debates in Parliament, that the grant of a monopoly patent might be defensible on some one of the following grounds:—

(1) It might be justified on the ground that the grantee had introduced a new invention into the kingdom and had thereby

[1] Above 344 and n. 6.

[2] Obviously these interests varied, and with them varied the character of the restrictions; thus privileges of exclusive trade with Spain, Portugal, and France had been given to the company of merchants trading to those parts, but in 1605-1606 this trade was thrown open, 3 James I. c. 6, without prejudice however to the privileges of the Merchant Adventurers of Exeter trading to France, 4 James I. c. 9. In Attorney-General of the Commonwealth of Australia v. Adelaide Steam Ship Co. Ltd. [1913] A.C. at pp. 794-795 Lord Parker does not sufficiently clearly distinguish between the very different meaning which the expression "freedom of trade" had in the sixteenth century from that which it has in our own day.

[3] Vol. iii 86-87.

[4] Pt. ii c. 1 § 6.

created a new industry. Fuller, who argued for the defendant, expressly admitted this: "Now therefore I will shew you how the judges have heretofore allowed of monopoly patents, which is, that where any man by his own charge and industry, or by his own wit or invention doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before: and that for the good of the realm: that in such cases the king may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth: otherwise not."[1] Bacon[2] and Coke[3] were of the same opinion. The consideration for the grant of a monopoly was therefore, as Mr. Hulme has pointed out, not the disclosure of the patentee's secret, but the furtherance of trade;[4] and it is for this reason that small improvements upon existing processes were not regarded as fit subjects of a grant.[5]

(2) Various restrictions on trade might be justified on the ground either (*a*) that, "true trade and traffic cannot be maintained or increased without order or government;"[6] or (*b*) on the ground that the restriction was necessary in the interest of the state.

(*a*) As an instance of a valid restriction of the first class Coke cites the institution "of a fraternity society or corporation of merchants to the end that good order and rule should be by them observed for the increase and advancement of trade and merchandise, and not for the hindrance and diminution of it."[7] Privileges granted to these bodies, though sometimes justified on the same grounds as the grant of a monopoly of a new manufacturing process,[8] were generally of the commercial and not of the manufacturing order; and they were not regarded as grievances. They were exempted from the bill of 1601, and from the Act which finally settled the law in 1624;[9] nor, having regard to the objects at which the legislative regulation of trade was

[1] Noy at p. 182. [2] D'Ewes 644.

[3] See State Papers Dom. (1598-1601) 521, cclxxvi 81 for an opinion given by Coke as Attorney-General.

[4] L.Q.R. xiii 313, 314.

[5] See the case of Matthey's Patent—an improvement in the making of knives—where it was ruled that, "such a light difference or invention should be no cause to restrain them," Noy 183; cf. Co. Third Instit. 184, "such a privilege must be substantially and essentially newly invented; but if the substance was in esse before, and a new addition thereunto, though that addition make the former more profitable, yet it is not a new manufacture in law," citing Bircot's Case Pasch. 15 Eliza.

[6] City of London's Case (1610) 8 Co. Rep. at p. 125a.

[7] Ibid.

[8] The grant of a monopoly of trade to the Muscovy company was justified on the ground that they had, "found out the trade at their great charges," Dasent vii 178 (1564).

[9] Below 353.

designed to effect,[1] and the manner in which these companies furthered these objects,[2] was the exemption so ridiculous as Bacon suggested.[3] No doubt this exemption opened the door to evasion;[4] and Bacon may have had this in his mind. But these grants of commercial privileges were strictly controlled by the Council;[5] and it is clear from the case of the *Cloth workers of Ipswich*,[6] and other cases, that the common law was quite prepared to see that these bodies used their powers for the purposes for which they were given. For instance, they refused to uphold their by-laws, though sanctioned as required by the Act of Henry VII.,[7] if they seemed to restrict unduly the common law right of every man to use his trade.

(*b*) A good instance of a restriction necessary in the interest of the state is the monopoly of the sole printing of books,[8] and the monopoly of saltpetre.[9] Moreover, as Bacon pointed out, fluctuations in the market might make certain temporary monopolies reasonable and lawful.[10] In *Darcy* v. *Allen* an attempt was made to justify the grant on similar grounds of public policy. Too much card playing, it was said, was bad for the morals of the subject, and therefore the crown might restrain it. Fuller

[1] Above 315-316, 326. [2] Above 320-321.

[3] D'Ewes 648 reports Bacon as saying, "the Bill is . . . ridiculous in that there is a proviso that this statute shall not extend to grants made to corporations: that is a gull to sweeten the bill withal, it is only to make fools fain."

[4] Vol. vi c. 6.

[5] Dasent xiii 137 (1581)—the Merchant Adventurers at Antwerp are to stay a suit till the Council is certified; ibid 206-208—alleged oppressive conduct of the Spanish Company to the citizens of Liverpool and Chester; ibid 378 (1585)—the Muscovy Company ordered to fulfil a bargain they had made with a merchant; xiv 10 (1585-1586)—the Barbary Company order to admit a member; ibid 97—a similar order against the Merchant Adventurers.

[6] (1615) 11 Co. Rep. 53a-54b; cf. Davenant v. Hurdis (1599) cited by Coke in the Case of Monopolies 11 Co. Rep. at p. 88a, 88b; the Chamberlain of London's Case (1591) 5 Co. Rep. 62b; Clark's Case (1596) ibid 64a.

[7] 11 Co. Rep. at p. 54b, Coke says that the court resolved that the statute (above 323 n. 9) "doth not corroborate any of the ordinances made by any corporation, which are so allowed and approved as the statute speaks, but leaves them to be affirmed as good, or disaffirmed as unlawful by the law. The sole benefit which the incorporation obtains by such allowance is that they shall not incur the penalty of £40 mentioned in the Act;" in the tract called "Observations on Lord Coke's Reports," attributed (probably falsely) to Lord Ellesmere (vol. v 478 n. 1), at p. 12 this view of the law is denied.

[8] Dodderidge *arg.* for the defendant in Darcy v. Allen admitted that it was good "quia necessary pur le peace and safety del Realm," Moore at p. 673.

[9] Ibid p. 831 *per* Fleming S.G. *arg.* for the plaintiff; cf. the Case of the King's Prerogative in Saltpetre (1607) 12 Co. Rep. at pp. 14, 15; above 299, 331.

[10] "Sometimes there is a glut of things when they be in excessive quantity, and her majesty gives a license of transportation to one man . . . sometimes there is a scarcity or a small quantity, and the like is granted also. These and divers of this nature have been in tryal at the Common Pleas . . . where, if the judges do find the privilege good and beneficial to the commonwealth, they then will allow it; otherwise disallow it," D'Ewes 644, 645; for cases of this kind see Dasent v 42 (1554); viii 167 (1573); ix 280, 297-298 (1576-1577); xi 222 (1579).

thoroughly exposed the fallacy of attempting to apply such an argument to that case.[1]

The agitation raised by the manner in which Elizabeth had used her prerogative to grant patents of monopoly had thus resulted in the ascertainment of some definite rules as to its extent. They were not observed by James I., who resorted to illegal grants of monopoly patents as a method of raising money.[2] But these rules commended themselves to the public opinion of the day, and they have had a lasting influence upon the law, because, in 1624, they were put into statutory form, and became in that form the basis upon which our modern patent law still to some extent rests.

The statute[3] began by reciting the existing law upon the subject and its infringement. For the future no such monopolies were to be granted, and the validity of any grant was to be tried by the common law.[4] Remedies were given to persons damaged by illegal grants.[5] Certain grants were saved. Among these were charters granted to corporations and companies "for the maintenance enlargment or ordering of any trade of merchandise;[6] privileges connected with printing; the making of saltpetre or ordonance or shot;[7] privileges connected with the manufacture of allum;[8] and grants connected with the licensing of taverns."[9] Obviously these savings represented the common law principle that certain forms of control must be exercised by the crown in the interests of the state. It was the sixth clause, defining the privileges which the crown might grant to new inventors, which is the foundation of the patent law of the present day. It provided that the crown might grant letters patent for fourteen years or under "of the sole working or making of any manner of new manufactures within this realm to the true and first inventor . . . of such manufactures, which others at the time of making such letters patents . . . shall not use, so as also they be not contrary to the law, nor mischievous to the state."

The remedies provided for the infringement of the Act, the new jurisdiction given to the common law courts to deal with

[1] Noy, 177-180; Patents licensing gaming, and giving the patentees power to compound for penalties, were justified in a similar way, see Aydelotte, Elizabethan Rogues and Vagabonds 103-107, 109; Aydelotte shows that it was largely due to these patents that the laws against gaming and the frauds to which it gave rise were so ineffective.

[2] Gardiner, History of England iv 6-20, 125; Carr, op. cit. lxxi-lxxii.

[3] 21 James I. c. 3; for the text of a bill against monopolies in 1621 see Debates in the House of Lords (C.S.) 151-155.

[4] 21 James I. c. 3 § 2. [5] § 4.

[6] § 9; this gave an opportunity for evasion by making grants to companies, of which Charles I. took advantage, Gardiner, op. cit. viii 71, 72; Carr, op. cit. lxxiii-lxxx.

[7] § 10. [8] § 11. [9] § 12.

disputes connected with these grants, and the limitation of the term to fourteen years were new provisions.[1] Otherwise the Act reproduced the existing law.[2] The consideration for the grant was, as before, the introduction of a new manufacture.[3] As before the true and first inventor meant not only the person who discovered a new process, but also a person who brought into England a process previously unknown to or unworked by Englishmen.[4] The question whether an invention was sufficiently novel was made to depend, not on prior publication, but wholly on the question whether or not there had been a prior user in England;[5] and the invention must be wholly new—not merely a small improvement upon an older invention.[6] Further, it is probable that the provision of the Act that the invention must not be "mischievous to the state" represented the view that an invention, though otherwise meritorious, ought not to be protected, or perhaps even allowed, if, for instance, it had the effect of creating unemployment.[7] But this provision was so vague that the interpretation put upon it has changed with every change in industrial organization and economic theory.

During the Stuart period and later the Council still continued to exercise the chief control over matters relating to patents.[8] When, at the end of the eighteenth century, patent cases began to come more frequently before the common law courts, the law which they developed diverged at some points from the principles which underlay the statute of 1624.[9] But, as I have said, the principles which it laid down still to a large extent govern us to-day. That so permanent a settlement could be arrived at in 1624 was to a large extent due to the fact that the leading principles of the law had been settled in Elizabeth's reign. We may perhaps infer that if some of the many other constitutional questions awaiting settlement had then been similarly settled, the position of her successor would have been an easier one to fill.

[1] L.Q.R. xvi 54, 55.

[2] Mr. Hulme, ibid 55, says, "In other respects . . . the statute must be interpreted as re-capitulating limitations already assigned by the common law, which limitations in their turn, . . . are such as were commonly prescribed in these grants for the purpose of safeguarding the powers with which the grantee was thus invested."

[3] Ibid 55; Hulme, Essays, A.A.L.H. iii 139-141.

[4] Ibid; cf. L.Q.R. xii 152.

[5] Ibid xvi 56; Hulme, Essays, A.A.L.H. iii 145.

[6] L.Q.R. xvi 56; cf. ibid xii 152.

[7] Thus Mr. Hulme says, L.Q.R. xii 152, that the application of one Lee for a patent for a stocking frame was said to have been rejected on the ground that the machine proposed to supersede manual labour; in 1623 the Council ordered a machine used for making needles to be destroyed together with the needles made by it, if cause was not shown to the contrary, Tudor and Stuart Proclamations i no. 1368.

[8] Hulme, Essays, A.A.L.H. iii 146-147; for illustrative cases see Acts of the Privy Council (1613-1614) 29-30, 61-62, 250, 269, 401-402, 497-498, 634-635; vol. vi c. 7.

[9] L.Q.R. xiii 318.

(v) *The enforcement of this commercial policy.*

It is one thing to pass statutes and to create a machinery for their enforcement: it is quite another thing to ensure that these statutes are actually enforced. In our own times this task taxes the energies of hosts of officials and inspectors. But during this period the government possessed very few paid servants of this type. How then did it provide for the enforcement of its commercial policy? The answer is that it relied in the first place upon the powers of the chartered companies, craft gilds, and boroughs. We have seen that their privileges were recognized by the common law, and saved by the Act of 1624.[1] Both in foreign and domestic trade their regulations were expected to ensure honest workmanship and reasonable skill. At the same time they could be made responsible for the carrying out of the statutes and proclamations relating to their particular industry or trade. In the second place, the government developed and extended another mediæval expedient for securing the enforcement of the law; and their action in this direction is historically interesting because, if the Great Rebellion had resulted in a victory for the king, it might have developed into the system of paid inspectors with which we are familiar to-day. Its history I must here sketch.

We have seen that in the Middle Ages it was a common expedient to give the public at large an interest in seeing that a statute was enforced by giving to any member of the public the right to sue for the penalty imposed for its breach, and allowing him to get some part of that penalty.[2] This expedient was largely used by the legislature in this period, both in the case of these statutes dealing with trade, and in the case of statutes dealing with many other subjects. But the Tudors improved on this idea. It might happen that no member of the public was willing to come forward and bring his action; and so, to meet those cases, it became customary to give commissions and patents to certain persons to sue for penalties, the whole or some part of which they were allowed to keep for their own use. The adoption of this expedient brings us a stage nearer the modern system of paid inspectors. These commissioners or patentees were the nominees of the central government and subject to its control. But as yet they were paid, not by the state, but by what they could make out of the public. In fact it may well be that they had paid the government for the right to exercise these powers. The final stage was reached when the duty of supervision was given

[1] Above 353.

[2] Vol. ii 453.

to special officials who were solely occupied in this duty. They differed from the commissioners or patentees in being more directly the servants of the government. They differed from the trading companies and local government bodies to whom, as we have seen,[1] these duties were sometimes entrusted, in being solely occupied with the work of supervision.

I must now say a few words about each of these stages in this development. They can be most clearly seen in connection with the commercial policy we have been considering; and I shall therefore deal with them at this point. But we should remember that this development was also taking place in connection with the enforcement of the law as to other subjects. It was in fact one, and not the least important, of those developments by means of which the modern machinery of government was being developed from a mediæval basis.

The number of statutes, old and new, in which the public at large was encouraged to enforce obedience to statutes by the promise of a share of the penalty imposed for disobedience was very large.[2] A statute of 1488-1489 strongly approved this expedient;[3] and as late as 1632 the Star Chamber, in order to suppress certain trade frauds, promised to give to informers half the fines which they imposed.[4] But it was an expedient which was open to many obvious abuses. Old statutes which had been forgotten were unearthed and used as means to gratify ill-will.[5] Litigation was stirred up simply in order that the informer might compound for a sum of money.[6] Threats to sue were easy means of levying blackmail. A "turbidum genus" of informers arose whom Coke classes with "the monopolist, the concealer, and the dispencer with publick and profitable penal laws" as the four varieties of "viperous vermin," "which endeavoured to have eaten out the sides of church and commonwealth."[7] Statutes of Elizabeth's reign attempted to cure the evil by small improvements in procedure. The informer was not allowed to sue by attorney, no compounding

[1] Above 320-322.

[2] The following are a few examples: 19 Henry VII. c. 19; 3 Henry VIII. c. 6; 23 Henry VIII. c. 4 § 3; 24 Henry VIII. c. 1 § 5; 27 Henry VIII. c. 12; 34, 35 Henry VIII. c. 6; 5, 6 Edward VI. c. 6 § 28; 1 Elizabeth c. 12; 23 Elizabeth c. 8.

[3] 4 Henry VII. c. 20; apparently offenders got friends to sue them in order to bar bona fide proceedings; to meet this device the statute provided that to the plea of judgment recovered (unless after a trial on the merits) covin could be pleaded, and that if this plea was proved, the plaintiff should recover and the defendant be imprisoned; moreover no release of the action by an informer was to stop the action.

[4] Attorney-General v. Jupp (1632) Rushworth vol. ii Pt. ii App. 49.

[5] Coke, Third Instit. 192, gives many examples. In one case in 1575 the Council induced an informer to stop his action against certain clothiers, the clothiers contributing to his costs, Dasent ix 16, 220, 263, 360.

[6] This is clear from the statutes of Elizabeth's reign, below 357 n. 1.

[7] Third Instit. 194; for the "concealer" see ibid c. lxxxvii.

of the action was to be allowed without leave of the court, a year was fixed as the limitation for an informer's action unless the statute fixed a shorter period.[1] Still further regulations were made by a statute of 1624, on which Coke wrote a comment.[2] The informer must sue either before the judges of assize or the justices of the peace of that county in which it was alleged that the offence was committed. He must state in his pleading and prove that the offence was committed in the county where he alleged that it was committed. He must swear to his belief in the truth of his allegations, and to the fact that the offence had been committed within the preceding year. The defendant might plead the general issue, and give special matter in evidence to the jury.

It is clear from Coke's treatment of the subject that these abuses had been very much aggravated by the device of issuing commissions and patents to certain persons to enforce these statutes. To the history of this device we must now turn.

With the increase in the number of the statutes which invited the common informer to sue for the penalty imposed for their breach, it became more and more obvious that this device did not always prove an effectual deterrent. To meet this difficulty the government sometimes issued commissions to persons authorizing them to seek out infringements of the law and to take the necessary proceedings, and rewarding them with a share of the penalty recovered.[3] It was soon seen that this was a valuable right. These commissions were sought for and issued in wider and wider terms. Persons were not only empowered to sue for penalties and allowed to keep the proceeds; they were also allowed to compound with offenders, and even to dispense (doubtless for a pecuniary consideration) with the observance of the statutes.[4] It was one thing to supplement the activity of the common informer by delegating persons to look into the infringements of statutes, and to sue for penalties on behalf of the crown. It was quite another to confer upon them these further prerogative rights; and matters were made worse when the Council interfered on behalf of the grantee to prevent any one else

[1] 18 Elizabeth c. 5, made perpetual by 27 Elizabeth c. 10; 31 Elizabeth c. 5.

[2] 21 James I. c. 4; Third Instit. c. lxxxviii.

[3] Dasent xi 26, 352, 384 (1578-1580)—commission to sue for penalties for infringing the statute as to wearing of caps, the money recovered to help on the industry, which was declining.

[4] Ibid xxiv 357 (1593)—a grant to one Dyer to dispense with penal statutes relating to the leather trade; xxiii 349 (1591)—a grant to Simon Bowyer of "one moietie of the penall statute made for the unlawful buying and selling of wools, reserving to the Queen the other moietie, with full power and aucthority in the said grante to searche try and finde out in all places convenient the abuses and deciptes in that behalf used and practised."

from suing for the penalty.[1] The abuse was growing so rampant that Parliament, Coke tells us, ceased to give the forfeiture from the breaches of statutes to the crown, and gave them instead "to the relief of the poor and other charitable uses which cannot be granted or employed otherwise."[2]

It is clear that the crown was abusing the powers which it possessed to enforce these statutes by means of actions for penalties, in a manner analogous to the way in which it was abusing its powers to grant monopolies to those who introduced a new manufacture. In fact these two perversions of prerogative rights were often found existing together.[3] The grant of a monopoly was often accompanied by a grant of powers to enforce statutes or to dispense with statutes. In *Darcy* v. *Allen* the grant was accompanied by a dispensation with a statute of Edward IV.'s reign[4] which forbade the importation of playing cards; and Coke tells us that it was resolved in 1602 that a dispensation of this kind which wholly defeated the aim of a statute was "utterly against law."[5] It was not until three years later that the *Case of Penal Statutes*[6] decisively condemned these grants by the crown of the right to sue for or dispense with the penalties prescribed by statute. The judges resolved that "if by the industry and diligence of any there accrueth any benefit to His Majesty," the king may reward such a person: but "that when a statute is made by Parliament for the good of the commonwealth, the king

[1] Dasent xxi 66 (1591), where it is recited that an earlier grant of half the forfeitures of a statute of Edward VI. as to buying and selling wool has been granted to the same Simon Bowyer, gentleman usher, with power to compound with offenders; and that other informers have brought actions and compounded; he is therefore to have his attorney in court to see that his profits are not intercepted by other informers.

[2] The Case of Penal Statutes (1605) 7 Co. Rep. at p. 37a.

[3] In 1606 the House of Commons passed "An Act for the better execution of penal statutes and restraint of monopolies;" it abolished all monopolies to do acts prohibited by penal statutes, Hist. MSS. Com. 4th Rep. 118.

[4] 3 Edward IV. c. 4.

[5] 11 Co. Rep. at p. 88a, "For it is true that for as much as an Act of Parliament which generally prohibits a thing upon a penalty, which is popular, or only given to the king, may be inconvenient to divers particular persons, in respect of person, place, time, etc., for this reason the law hath given power to the king, to dispense with particular persons. . . . But where the wisdom of Parliament has made an Act to restrain *pro bono publico* the importation of many foreign manufactures, to the intent that the subjects of the realm might apply themselves to the making of the said manufactures etc. . . .; now for a private gain to grant the sole importation of them to one or divers . . . notwithstanding the said Act, is a monopoly against the common law, and against the end and scope of the Act itself;" it may perhaps be noted that there is nothing of this in Moore's report of the case, and the writer of the Observations on Coke's reports at p. 7 denies that the judges ever decided this point; there are many instances in which the crown dispensed with these statutes dealing with trade, see Dasent ii 142-143 (1547)—statute as to the import of cloth dispensed with at the suit of the Merchant Adventurers; iv 272 (1553)—certain Frenchmen allowed to import caps *non obstante* the statute; xix 282 (1590)—dispensation of a statute as to the manufacture of leather in favour of the curriers; xxxii 489 (1602)—dispensation with the statutes as to the export of cloth undressed.

[6] (1605) 7 Co. Rep. 36.

cannot give the penalty benefit and dispensation of such Act to any subject; or give power to any subject to dispense with it . . . for when a statute is made *pro bono publico*, and the King . . . is by the whole realm trusted with it; this confidence and trust is so inseparably joined and annexed to the Royal power of the King in so high a point of Sovereignty that he cannot transfer it to the disposition or power of any private person or to any private use." Further, it was resolved, "that it is inconvenient that the forfeiture upon penal laws or others of like nature should be granted to any before the same be received or vested in His Majesty by due and lawful proceedings;[1] for that in our experience it maketh to the more violent and undue proceedings against the subject, to the scandal of justice and the offence of many."

It was largely owing to this decision that the statutes of James I. succeeded better than the statutes of Elizabeth in suppressing the most crying evils arising from the activity of the common informer. Many questions as to the limits of the dispensing power yet remained to be settled.[2] But grants of this power to private persons were not so frequent;[3] and the law as to its use in connection with grants of monopolies was settled by the same statute as that which settled the law as to the validity of monopolies themselves.[4] The device of granting a commission or patent to sue for penalties had failed. We must now say something of the beginnings of the modern device of employing an official to see that the law is obeyed.

In the Middle Ages the only instance of the appointment of such an official is found in connection with the wool and cloth trade. To supervise this trade there was an official known as the "Aulnager."[5] His office had been developed by the creation in 1594 of the Aulnager of "the new drapery;" and his duties were further defined in 1605.[6] In 1619 a surveyor of lead was appointed, and in 1639 an office was established to detect abuses in the dyeing of silk.[7] We read also of a surveyor of coal, of ale houses, and other trades.[8] But these officials often abused their

[1] See Dasent xiv 169 (1586) for a case where the penalty for coining offences was granted before conviction.

[2] Vol. vi. c. 6.

[3] In 1613 there is a grant to Lord Morley of "money or other profits as shall accrue to his Majestie upon accions, informacions, and seizures in the Courtes of Exchequer at King's Bench, either by judgment or composicion upon penall lawes," made after consultation with the law officers, Acts of the Privy Council (1613-1614) 231.

[4] 21 James I. c. 3 §§ 1, 6-8.

[5] Cunningham, op. cit. i 308; ii 296, 297; for the aulnager at the mediæval fairs see Select Cases in the Law Merchant (S.S.) i 37, 41; see Dasent, xxii 242 (1591-1592) for some disputes between the aulnager and the Wiltshire clothiers; for another dispute see Acts of the Privy Council (1613-1614) 164-165.

[6] Cunningham, op. cit. ii 297.

[7] Ibid ii 299, 300.

[8] Ibid ii 302, 303, 305.

powers. They incurred much popular odium; and they went under when the Long Parliament put a final end to prerogative government. Thus the attempt to convert the clerk of the market and his deputies—the officials responsible for the correctness of weights and measures—into royal officials with large powers of supervision, was put an end to in 1640.[1] It is not till quite modern times that the central government again seriously attempted to regulate, by means of its own officials, the conduct of the various trades and manufactures of the country. The result was that during the latter part of the seventeenth century the only effective control exercised over them came from the companies, craft guilds, and boroughs whose powers had, as we have seen, been recognized by the Act of 1624.[2] Except in cases where this control was exercised, it was left to those of the general public who were interested in so doing to put the provisions of the statutes into force.

The Stuarts followed the Tudor tradition. They endeavoured to organize both external and internal trade, and all branches of industry with a view to the maintenance and increase of national strength; and in order to create a strong and contented people, they aimed, as we shall see, "at so ordering the economic life of the country that every man should have opportunities of practising his calling, and that he might be able to count on obtaining the necessaries of life at reasonable prices and of a good quality."[3] To attain this object completely was impossible in the sixteenth or in any other century. But in the seventeenth century its attainment was especially impossible. The enforcement of this policy necessarily depended upon the prerogative. Thus we get prosecutions in the Star Chamber for various trade frauds—deceitful dyeing of silk,[4] the deceitful manufacture of gold and silver hat bands,[5] passing off bad cloth as good by means of counterfeit seals.[6] But the nation was already chafing at prerogative rule; and the various restrictions which this system necessarily involved all went to swell the increasing unpopularity

[1] 16 Charles I. c. 19; cf. Cunningham, op. cit. ii 94-96; for these officials see vol. i 150; when Coke said, Fourth Instit. 273, "the clerk of the market shall hold no plea but such as were holden in the reign of Ed. I.," he no doubt had these extensions in his mind.

[2] Above 353.

[3] Cunningham, op. cit. ii 285; a good illustration of the careful way in which the Council tried to prevent changes in the course of trade which caused unemployment, is to be seen in the case which arose out of the disturbance to the Welsh cloth trade caused by the operations of one Charleton and the company of French merchants, Acts of the Privy Council (1613-1614) 9-10, 34-40, 51-53, 191-192, 310-311, 351-355.

[4] Atty.-Gen. v. Yeomans (1630) Rushworth vol. ii Pt. ii 25-64; Atty.-Gen. v. Sampson (1631) ibid 30, 31.

[5] Bayneham v. Grymes (1632) ibid 43; cf. Star Chamber Cases (C.S.) 115-116.

[6] Atty.-Gen. v. Jupp (1632) Rushworth vol. ii Pt. ii 48-49,

of the central government. The jealousy of the privileged companies which controlled the foreign and much of the internal trade of the nation,[1] the objections to re-arrangements of the tariff which put or seemed to put greater burdens on the nation,[2] the abuses of monopolies,[3] and the exactions of the commissioners entrusted with the duty of searching out breaches of the law,[4] were all turned to account by those who saw in this economic system only a series of systematic encroachments upon the liberty of Englishmen.

But though all the objects of this economic policy were impossible of attainment, it must be admitted that some had been in great measure attained. The measure of its success is the difference between the economic position of England at the beginning of this period and at the end. England had not only taken the conduct of her own foreign trade into her own hands, she had also begun to be a manufacturing country. London had begun to be a financial centre comparable to the commercial cities of the Netherlands.[5] "Trade," Clarendon says, "had increased to that degree that we were the exchange of Christendom (the revenue thereof to the crown being almost double to what it had been in the best times), and the bullion of all other kingdoms brought to receive a stamp from the mint of England; all foreign merchants looking upon nothing as their own, but what they had laid up in the warehouses of this kingdom." [6]

Necessarily this changed economic position involved great developments in commercial law. We shall see that many new doctrines, well known in Italy and the trading centres of the South of Europe, came to England when, partly by reason of changed geographical conditions, and partly by reason of the wise policy pursued by the Tudor and to some extent by the two first Stuart kings and their Parliaments, Englishmen began to obtain a share of that larger commerce which in the Middle Ages these foreign cities had almost entirely monopolized. New branches of law appear on the statute book—we see the beginnings of the usury laws, the bankruptcy laws, and the laws as to insurance. Other new branches of law make their appearance in the cases reported by the courts. Banking, negotiable instruments, bills of lading, partnerships, and companies begin to set new problems to the judges; and many topics of maritime law, such for instance as salvage, collision, and bottomry begin to

[1] Above 320-322.
[2] Above 338; vol. vi c. 6.
[3] Above 347-348.
[4] Above 357-358.
[5] Cunningham, op. cit. ii 147, 148, "After the failure of Alva's administration . . . Antwerp declined rapidly, and London came to be more and more of an important trading and monetary centre."
[6] History of the Rebellion (ed. 1843) 31.

assume their modern aspect. The foreign doctrines upon these and similar topics were gradually assimilated into the fabric of English law by the legislature and the judges. By far the most important part of this work was done by the judges. They and other members of the legal profession helped to frame the statutes passed to deal with the new commercial conditions; and they applied and interpreted them. Moreover both these statutes and the new doctrines of commercial law frequently came before the judges and law officers of the crown in their capacity of advisers or members of crown and council. Both their judicial and advisory duties thus introduced the judges and law officers to the new world of commerce, and to the rules of the law merchant by which it was governed. I cannot but think that the knowledge thus acquired of these new legal doctrines was one of the chief causes that led Coke and his companions to desire to control this new field of legal activity; and, with that object, to begin their campaign against the Admiralty and other rival courts, which led ultimately to the incorporation of English mercantile law with the common law.[1] But of all these matters I shall speak more at large in the following chapter,[2] and in the second Part of this Book.[3] We must now turn to the closely connected and not less important changes which the legislature made during this period in the more purely domestic departments of commerce and industry.

(2) *Agriculture, the Food Supply, and Prices.*

The statutes passed to regulate and promote trade with a view to the maintenance and increase of national power would have been of little avail if the legislature and the executive had not taken steps to maintain an adequate food supply. This meant a careful supervision and regulation of all matters pertaining to agriculture. Indeed, the prosperity of the agricultural interest was a condition precedent to the success of all other economic legislation, because unless its prosperity had been maintained, the food supply of the nation would have been diminished, and the population would have declined. Not only would there have been a risk of famine and consequent disorders, but also the force available to quell these disorders or to resist foreign invasion would have been weakened, and the revenue of the state would have been impaired.[4] But the

[1] Vol. i 558, 568-573. [2] Vol. v 129-148.
[3] Pt. II. chap. iv.
[4] Mr. Gay, Tr. Royal Hist. Soc. (N.S.) xiv 244 puts this very clearly—"The centre of social interest lay in the preservation of husbandmen, who were the soldiers and taxpayers as well as the breadwinners of the common weal. If by hateful covetousness they were driven from their homes, the State was disquieted by the resulting vagabondage and robberies of the individual or the riots of the mob."

agricultural, in common with other industries, was passing through a period of change in methods and ideas. The old customary methods were being superseded by newer methods which made for increased production; and a change of this sort was, as Mr. Johnson has said, inevitable "if England was ever to advance out of the most primitive condition and methods of cultivation."[1] This change caused at first considerable hardship to individuals. The break up of the old organization and old customary methods of cultivation, the clashing interests of the different classes who made their living from the land, the political influence of the larger landowners, and the complexity of the land law, made the task of guiding and directing the transition more difficult than in the case of any other industry. But the problem to be solved in the case of the agricultural industry was essentially the same as in the case of other industries. Within what limits could the state allow the self-interest of the individual free play without injury to itself? On what terms could it adjust its own interests, those of the producer, and those of the consumer? How, in short, could the necessary changes be so directed as to conduce to the maintenance and increase of its own power? The Tudors directed these changes with this object in view; and they attained no small measure of success. The wealth and importance of the landowners were increased by the introduction of improved methods of cultivation, with a resulting increase in the revenue of the state;[2] and though hardship was inflicted in the process upon the smaller occupiers of the land, this was, to a certain extent, met by legislation which endeavoured to prevent the wholesale eviction of tenants, by the growth of the manufacturing industry, and by the minute regulation of the supply and prices of food. The measure of the success of the Tudor legislation is the increase in the prosperity of the country, and the firmness with which the authority of the government was established amid changes which might well have endangered its peaceful development.[3]

In describing the policy pursued by the Tudor legislation I shall deal firstly with the statutes passed to regulate or mitigate the agrarian revolution, and secondly with the statutes passed to regulate the food supply and prices.

[1] The Disappearance of the Small Landowner 56; cf. Gonner, Common Land and Inclosure 302-304, 340.

[2] See below 374 n. 6 for the statutes of Elizabeth's reign which allowed the export of corn when the price was at a certain level, on payment of an export duty; and ibid for the statutes which permitted export with licence purchased from the crown.

[3] Cunningham, op. cit. ii 98-107.

(i) *The Agrarian Revolution.*[1]

I have already said something of this revolution in dealing with the history of methods of cultivation,[2] and of unfree tenure.[3] This revolution involved the abolition of the system of common field cultivation, and the substitution for it of individual ownership or occupation of continuous tracts of land, which could be devoted either to pasture or to arable farms. Consequently the old cultivating community was broken up, many of the smaller owners were evicted from the land, and rights of common either in the open fields or in the waste disappeared. No doubt rights of common were to some extent guarded by the statutes of Merton and Westminster II.;[4] and these statutes were expressly confirmed by a statute of Edward VI.'s reign.[5] But the rights of common to which these statutes applied were, as we have seen, somewhat limited; and if by agreement, purchase, or eviction a whole manor was enclosed, existing rights of common disappeared with the disappearance of those entitled to exercise them. That these enclosures raised the value of the property is clear. The evidence of writers on agriculture, such as Fitzherbert and Tusser and many others, is quite unanimous.[6]

This rise in value took place whether the land inclosed was used for pasture or for arable farming. But it made a good deal of difference to the occupiers of the land whether the inclosed land was used for the former or the latter purpose. If it was used for pasture families were evicted wholesale, buildings fell into decay, unemployment increased, and whole tracts of country were depopulated and left defenceless.[7] On the other hand, if it was used for tillage the demand for labour was not seriously diminished, the yield of the land was increased, and both the state and the landowner profited.[8] Therefore we are not sur-

[1] The chief authorities are—Leadam, Domesday of Inclosures (Royal Hist. Soc.); Royal Hist. Soc. Tr. (N.S.) xiv 231-303, papers by Gay and Leadam on the interpretation of the Domesday of Inclosures; ibid xix 101-146—a paper by Miss Leonard on the Inclosures of Common Fields in the seventeenth century; ibid (Third Series) iv 7-11—a passage from Dr. Cunningham's Presidential address; E.H.R. xxiii 477-501—an article by Mr. Gonner on the Progress of Inclosure during the seventeenth century; A. H. Johnson, The Disappearance of the Small Landowner; Gonner, Common Land and Inclosure; Tawney, The Agrarian Problem in the Sixteenth Century; cf. also the other authorities cited vol. ii 56 n. 1, and the notes to pp. 56-61.

[2] Vol. ii 60-61. [3] Vol. iii 209-211. [4] Ibid 147-149.

[5] 3, 4 Edward VI. c. 3; cf. Gonner, Common Land and Inclosure 51.

[6] Vol. ii 60; cf. Johnson, The Disappearance of the Small Landowner 55, 56.

[7] Above 362; cf. Johnson, op. cit. for some extracts from the literature of the period; Aydelotte, Elizabethan Rogues and Vagabonds 10-12; Tawney, The Agrarian Problem in the Sixteenth Century 344-345.

[8] Gay, Tr. Royal Hist. Soc. (N.S.) xiv 292, 293; Mr. Leadam, however, takes the view that the one form of inclosure was just as objectionable as the other form, and that the authorities wished to check both forms, see the two volumes of the Domesday of Inclosures (Royal Hist. Soc. N.S.), and Tr. Royal Hist. Soc. (N.S.) xiv 231-303 for the controversy between him and Mr. Gay on this point.

used to find that the state adopted a different attitude according as the enclosed land was used for the one purpose or the other. Neither form was left wholly unregulated; but the nature of the regulations and the manner in which they were enforced were very different.

Against inclosure for the purpose of creating large pasture farms the legislature had set its face from the first days of the Tudor dynasty. The series of statutes begins with two statutes passed in 1488-1489. The first was a local Act and applied only to the Isle of Wight.[1] The second was a general Act. It provided that lessees of farms with twenty acres of land attached must maintain the buildings necessary for the tillage of that land; and that if they did not, the lord of the fee, or in default the king, might enter and take half the profits till the buildings were repaired.[2] In 1514-1515 another Act to the same effect was passed; and it was further provided that all buildings used for tillage on the first day of that Parliament should be repaired.[3] In 1533-1534 it was provided that no tenant farmer should keep more than 2,000 sheep under a penalty of 3s. 4d. a sheep. There were certain exceptions to the operation of the Act, the most important of which was the proviso that it should not apply to the owner of an estate of inheritance in the land.[4] In 1535-1536[5] complaint was made that these Acts were only enforced on the king's lands; and it was provided that in certain counties,[6] in which the evil consequences were most severely felt,[7] the king should be entitled to sue for the penalty of half the profits under the earlier Acts. In 1551-1552 it was provided that as much land was to be tilled annually as was tilled in the first year of Henry VIII.'s reign, and a commission was appointed to see that the statute was obeyed.[8] In 1555 another commission was appointed to see to the execution of the Acts of 1488-1489 and 1514-1515. It was given power to mitigate the provisions of these Acts, and an appeal was allowed from its decisions to the court of Star Chamber.[9] The two last-mentioned Acts were repealed in 1562-1563 by an Act which confirmed the Acts of 1488-1489 and 1514-1515.[10]

This Act was itself partially repealed in 1593;[11] but the result was an increase of inclosure for pasture farming. Therefore

[1] 4 Henry VII. c. 16.
[2] 4 Henry VII. c. 19.
[3] 6 Henry VIII. c. 5, made perpetual 7 Henry VIII. c. 1.
[4] 25 Henry VIII. c. 13.
[5] 27 Henry VIII. c. 22.
[6] The counties were Lincoln, Nottingham, Leicester, Warwick, Rutland, Northampton, Bedford, Buckingham, Oxford, Berks, the Isle of Wight, Worcester Hereford, Cambridge.
[7] Below 367.
[8] 5, 6 Edward VI. c. 5.
[9] 2, 3 Philip and Mary c. 2.
[10] 5 Elizabeth c. 2.
[11] 35 Elizabeth c. 7.

in 1597 two consolidating Acts were passed which repealed all the former Acts and substituted new and more elastic provisions. The first was a general Act and was designed to compel the rebuilding of houses of husbandry.[1] The second applied only to certain counties, and was designed to effect the re-conversion of pasture into arable.[2] Both these statutes expired in 1604.[3] The former Acts were thereupon revived; but, with the exception of the Act of 1533-1534, they were all repealed in 1624.[4] Their repeal was approved by Coke, who tells us that their provisions were so intricate that they produced little effect.[5] But the government was not left without remedy against landowners who depopulated the country by their inclosures. There was still the Act of 1533-1534; and inclosers were liable to be proceeded against at common law for depopulation.[6] Such proceedings were in fact taken by the Star Chamber as late as the year 1639.[7]

These statutes were difficult to enforce because the governing classes were the principal delinquents.[8] But the evils of these inclosures were so obvious, and the complaints and discontent excited by them were so great,[9] that the Council was obliged to take action. In 1517 and 1519 Wolsey issued commissions to ascertain the extent of the inclosures made, and legal proceedings were taken upon the information thus supplied.[10] Other commissions were issued and enquiries made in 1548, 1566, 1607, 1632-1636, and in Lincolnshire in 1614;[11] and action was taken

[1] 39 Elizabeth c. 1.

[2] 39 Elizabeth c. 2—this Act only applied to the counties specified in 27 Henry VIII. c. 22, above 365 n. 6, and to Gloucester, Hampshire, Wilts, Somerset, Dorset, Derby, Huntingdon, York, Pembroke, bishopric of Durham, and Northumberland.

[3] They were only to last till the end of the next session of Parliament; they were renewed by 43 Elizabeth c. 9 till the first session of the next Parliament, and by 1 James I. c. 25 till the first session of the next Parliament.

[4] 21 James I. c. 28; the Act of 1533-1534, 25 Henry VIII. c. 13, was not repealed till 19, 20 Victoria c. 64.

[5] Third Instit. 204, "they were so like labyrinthes, with such intricate windings and turnings, as little or no fruit proceeded of them;" for some illustrations see Tawney, The Agrarian Problem in The Sixteenth Century 379.

[6] Third Instit. 204-205; S.P. Dom. clxxxvii no. 95 (1631), "the decay of tillage and houses of husbandry are the undoubted causes and grounds of depopulation, and a crime against the common laws of this realm. And every continuance thereof is a new crime, as hath been lately declared by sentence in the Starre Chamber in Sir Anthonye Rooper's case," cited by Miss Leonard, Royal Hist. Soc. Tr. (N.S.) xix 129 n. 7; cf. Hawarde, Les Reportes etc. 75-77

[7] Johnson, op. cit. 46, 47; Royal Hist. Soc. Tr. (N.S.) xix 128, 129; see S.P. Dom. (1634-1635) 233-234, cclxxv no. 36 for a case in which a Kentish Landowner was fined £2,500 for converting 700 acres from tillage to pasture; and ibid (1639-1640) 181, ccccxxxvi no. 36 for a note of another similar case.

[8] Johnson, op. cit. 84, citing Latimer's Sermons i 93, 94.

[9] Tawney, The Agrarian Problem in the Sixteenth Century 317-320.

[10] Leadam, Domesday of Inclosures i 9-12; Gay, Royal Hist. Soc. Tr. (N.S.) xiv 235, 236.

[11] Ibid 236, 237; Leonard, ibid xix 125.

by the Council on the evidence thus supplied.[1] There seems, however, good reason to suppose that it was only Wolsey's commission that resulted in any really definite action being taken against the inclosers.[2] The opposition of the governing classes was strong enough to prevent any very general action on the part of the central government.[3] In fact it would appear that the government in the late sixteenth and early seventeenth centuries was only stirred to action if it appeared that the misdeeds of the inclosers were endangering the peace of the country.[4] Thus we get very frequent complaints from the Midland counties. They are always included in the statutes which were passed to prevent inclosures of this kind;[5] and the commission of 1607 was caused by a rebellion in Northamptonshire, and was confined to the counties of Leicester, Nottingham, Bedford, Bucks, Hunts, and Lincoln.[6] We might, therefore, suppose that in the sixteenth and seventeenth centuries the inclosure movement was proceeding most rapidly in the Midland counties. But as a matter of fact the inclosure Acts of the eighteenth and nineteenth centuries show that these counties were least affected by the inclosure movement of these centuries.[7] The truth appears to be that "the Midland counties were then the great corn-producing counties of the kingdom, and consequently the change to pasture farming, and the consolidation of farms often accompanying inclosure, displaced a larger population in this part of the country than elsewhere. Moreover, at this date fewer manufactures were carried on in the Midland district than in other parts of the country, and consequently the population turned adrift by agricultural changes had a greater difficulty in finding other employment."[8]

The later inquisitions brought in money to a government

[1] Gay, Royal Hist. Soc. Tr. (N.S.) xiv 239, 240, 241, "Excluding all count of the writs, there remain, during the reign of Henry VIII. 423 entries of proceedings on inclosure cases; under Edward VI. 50 more are returned, 51 under Philip and Mary, 83 under Elizabeth; and when in 1599 the last case is reached there is a total of 607 entries . . . representing the grist brought to the slow mills of the Exchequer by the industry of Wolsey's commissioners;" of course the number of entries is no sure guide to the number of cases, above 254.

[2] Ibid 236, "Through the whole Tudor period his was the only honest enforcement of the law against what right-minded men held to be an intolerable evil."

[3] Crowley, Way to Wealth (E.E.T.S.) 144.

[4] For some instances of interferences in the sixteenth century see Tawney, The Agrarian Problem in the Sixteenth Century 374-376.

[5] Above 365 n. 6.

[6] Leonard, Royal Hist. Soc. Tr. (N.S.) xix 125.

[7] Ibid 134-136.

[8] Ibid 103, 104; Moore, A Scripture word against Inclosure (1656) introd., says, "I complaine not of inclosure in Kent or Essex, where they have other callings and trades to maintaine their country by, or of places near the sea or city, but of inclosure in the inland countreys which takes away tillage, the only trade generall they have to live on," cited ibid 139.

which was sadly in need of it;[1] and they also, as we have seen, checked the rate of inclosure in the Midland counties. But, as we have seen, the government was stirred to enforce these statutes chiefly when their non-observance was endangering the peace of the country. And seeing the difficulties which must have attended their enforcement through the ordinary machinery of local government, and seeing also that the inclosures did undoubtedly increase the productiveness of the land,[2] and therefore the aggregate wealth of the country, this policy was probably wise. At the end of the sixteenth century the agricultural industry was adjusting itself to the new conditions. The encouragement of the government,[3] and the increased demand of a growing population, made arable as profitable as pasture farming on soil which was suitable to corn growing.[4] More land was being drained, and brought under the plough;[5] and the growth of manufacture provided an outlet for surplus labour in many places.[6] The repeal of the inclosure Acts in 1624 is a significant sign of the times. We hear little more of the agitation against inclosure after the Great Rebellion. Partly no doubt this is due to the fact that the great landowners were now all powerful in the state; but chiefly it is due to the fact that the dangers to which, in the sixteenth century, the growth of pasture farming had exposed the state were things of the past. Inclosures took place all through the seventeenth century; but they were "essentially connected with the growth of farming."[7] They were caused by a desire to "put land to the use for which it was best fitted;"[8] and this desire was often strengthened by the growth of towns which came with industrial development.[9] For these reasons the agrarian changes were able to proceed not merely without the disapproval, but even with the active assistance of the legislature.[10]

[1] Gonner, E.H.R. xxiii 486, 487.

[2] "One acre inclosed was said by Norden to be worth one and a half of common field, and his evidence is confirmed by other writers, who, indeed, often allege an even greater advantage to the land in severalty," Leonard, Royal Hist. Soc. Tr. (N.S.) xix 114; cf. Cunningham, Royal Hist. Soc. Tr. (Third Series) iv 9, citing Fitzherbert's Husbandry.

[3] By the Acts mentioned above 365-366; and by the permission to export corn, below 374.

[4] Cunningham, Industry and Commerce ii 98-100.

[5] Ibid ii 112-119; 43 Elizabeth c. 11 was passed to facilitate projects of this kind; though little was actually done in this century, public opinion was being educated, and the Act gave impulse to the movement, Cunningham, op. cit. ii 119 n. 1.

[6] Cf. Gonner, Common Land and Inclosure 386.

[7] Ibid 138. [8] Ibid 137. [9] Ibid 176-177.

[10] Johnson, Disappearance of the Small Landowner 84-86; the earliest inclosure Act is 4 James I. c. 11; there was not another till 4 William and Mary no. 31, and they do not become common till George II.'s reign, Leonard, Royal Hist. Soc. Tr. (N.S.) xix 108; below 369-370.

The inclosure of land and the consolidation of farms for the purposes of tillage was hardly touched by this series of statutes. It is true that certain buildings must be maintained.[1] It is true also that four acres of land must be attached to each cottage,[2] and that near London the inclosure of common lands was prohibited.[3] But, apart from these restrictions, the only enactment which seems to bear on this form of inclosure is § 14 of the Act of 1533-1534,[4] which provided that no one should take a lease for life years or at will in land of freehold or copyhold tenure of more than two houses or tenements of husbandry to which lands were annexed; and that the lessee should dwell in the parishes in which these lands were situate.[5] The clause seems to be designed to prevent the consolidation of farms, whether for pasture or arable, in cases where such consolidation involved the destruction of buildings. It is directed to the same object as the clauses in the Acts of Henry VII., Henry VIII., and Elizabeth noted above. It did not prevent owners from consolidating, nor did it prevent consolidation by lessees if no destruction of buildings was involved.

The fact that inclosure for the purpose of tillage was going on side by side with inclosure for the purpose of sheep farming no doubt caused some additional distress.[6] But it was not actively discouraged by the legislature because it was beneficial to the state. It increased the productiveness of the land without seriously diminishing the population. No statute made it unlawful for a man to buy out his neighbours, or for all the inhabitants to agree to inclose their common fields.[7] In some cases the richer landowner may have exerted an undue pressure on his poorer neighbours; and in some cases he may have harshly exercised his legal rights to evict or to refuse to renew a lease.[8] But in other

[1] 4 Henry VII. c. 19; 7 Henry VIII. c. 1; 39 Elizabeth c. 1.

[2] 31 Elizabeth c. 7—the idea seems to have been to prevent the growth "of a landless class of married labourers who might burden the rates," Leonard, Royal Hist. Soc. Tr. (N.S.) xix 124; it was repealed by 15 George III. c. 32.

[3] 35 Elizabeth c. 6—no common land to be inclosed within three miles of London —a rule apparently that the Queen had before this statute applied both to London and other towns, Dasent xv 425, 426 (1587-1588).

[4] 25 Henry VIII. c. 13.

[5] "No person . . . shall receyve or take in ferme for tyme of lyff yeres or at wyll by indenture copy of Courte Rolls or otherwyce any moo houses and tenements of husbandrye whereunto any lands are belongyng . . . above the nomber of two suche holdes or tenements; and that no maner person shall have or occupie any suche holdys so newly taken to the nombre of two . . . except he or they be dwellyng within the same parisshes where suche holdys be."

[6] Cunningham, Royal Hist. Soc. Tr. (Third Series) 8-10.

[7] For instance, see Leonard, Royal Hist. Soc. Tr. (N.S.) xix 107-110; a procedure was provided by 35 Henry VIII. c. 17 § 6 for the inclosure of wooded land on which others had rights of common, in case no agreement could be reached.

[8] Johnson, op. cit. 65-68; Leonard, op. cit. 115, 118-122; eviction or refusal to renew were not possible in the case of the owners of estates of inheritance in lands

cases the conversion of the common field into several holdings was fairly carried out.[1] The fact that the Council and the Star Chamber were ready to use their large powers to soften the shock to those who complained that they were injured by the change was not without its effect. We have already seen how much they effected for the copyholder and the villein;[2] and it is clear that, though they sternly repressed any attempt to obtain supposed rights by rioting or violence,[3] they were always ready to listen to complaints of injury inflicted by inclosure,[4] and to urge upon landowners the duty of dealing liberally by their tenants. In 1597 complaints had been made that inclosures made by one William Harman at Shipton had deprived his tenants of their common rights. The Council wrote to him on the subject "Wee do not herby debarre you," they said, "from any proceedings or accions in law concerninge the said grounds, but do wishe you rather to consider what is agreeable in this case to the use of the State and for the good of the common welthe, than to seeke the utter most advantage that a landlord for his particular profitt maie take amonge his tenants."[5]

But though, in the interests of the public order, the government was ready to do all that it could to protect those injured by the agrarian changes, there was no thought of attempting to impede forms of individual activity which were profitable both to their promoters and to the state.[6] Rather they were assisted both by the executive and the legislature.[7] New statutes added to the powers of the commissioners of sewers.[8] Schemes to reclaim waste land were encouraged,[9] and the

held by copyhold tenure, vol. iii 211-212; hence the desire of lords to prove that their tenants held on leases for years or lives, cf. Johnson, loc. cit.

[1] "It cannot be said that the poorer classes were wronged by the legal methods usually employed in common field inclosures, for these compare very favourably with those of the Private Acts," Leonard, op. cit. 114; for these methods see ibid 107-110.

[2] Vol. iii 211, 504-505.

[3] Dasent xxvi 364, 365, 383 (1596)—inclosure riots in Oxfordshire.

[4] See e.g. ibid xvii 244, 303 (1589); xxvi 382 (1596).

[5] Ibid xxvii 129 (1597).

[6] See Gonner, Common Land and Inclosures 165-166. "A clear distinction was drawn between inclosures which led to depopulation, and those which had no necessary tendency in this direction. The action of the State was determined by this consideration," ibid 390.

[7] We get a number of local Acts passed to facilitate such changes see e.g. 3 James I. c. 18, 4 James I. c. 12 (the New River); 4 James I. c. 8 (drainage of marsh land in Kent); 4 James I. c. 13 (drainage works, Isle of Ely); 7 James I. c. 20 (drainage works, Norfolk and Suffolk) (new weir on the Exe); 3 James I. c. 20, 21 James I. c. 32 (improving navigation of the upper Thames).

[8] Vol. ii 467 n. 1; 4 Henry VII. c. 1; 6 Henry VII. c. 10; 23 Henry VIII. c. 5; 1 Mary Sess. 3 c. 12; 3 James I. c. 14.

[9] See e.g. Dasent xxix 323, 329, 395 (1598) for the encouragement given by the Council to the project for draining the fens; and see Atty.-Gen. v. Forkesey and others (1632) Rushworth vol. ii Pt. ii App. 39, 40, and Star Chamber Cases (C.S.) 59-65, for the manner in which the Star Chamber dealt with the riots caused by the drainage of the Lincolnshire Fens.

export of corn in years of plenty was allowed.[1] The statute of 1562-1563, which dealt with apprenticeship,[2] attempted to solve the problem of apportioning the supply of labour between the agricultural and other industries. It provided that persons between the ages of twelve and sixty not otherwise employed, and not being otherwise exempt,[3] must serve at husbandry; that artificers and other persons "meet to labour" must work on the land at the time of the hay or corn harvest;[4] and that any householder tilling half a plough land should be allowed to take an apprentice in husbandry.[5] At the same time the property qualification and other conditions which a parent must comply with if he wished to apprentice his children to certain trades were designed to secure a supply of labour sufficient for the needs of landowners and farmers.[6] Such encouragement, by helping forward changes which increased the productiveness of the land, diminished that danger of scarcity or famine which was an ever-present fear to the statesmen of the sixteenth century; while the duty imposed on export in times of plenty brought revenue to the state.

In fact the changes in the agricultural industry were analogous to the changes which were taking place in other branches of industry. In all alike the application of capital introduced new methods, a more elaborate organization, and a larger output.[7] The business of agriculture, like other businesses, was now carried on, not entirely with a view to the maintenance of the landowner and his family from the produce raised, but also with a view to the profitable sale of the produce in a market.[8] This development could hardly have taken place unless these large changes in agricultural methods had been made. The common field system left little scope for the energies of an enterprising man. It was otherwise under the new system under which compact farms were managed by one person. Sir Thomas Smith notes that the thrifty yeomen "daily doe buy the landes of unthriftie gentlemen."[9] In fact it paid an enterprising man to invest capital in the land. Nor was there any want of persons ready to invest their money in this way. Not only yeomen, but also prosperons merchants were ready to do so, because they could make a profit out of the land by letting it to the yeomen farmers,[10] and because

[1] Below 374 n. 6.
[2] 5 Elizabeth c. 4; above 341-342.
[3] 5 Elizabeth c. 4 § 5.
[4] 5 Elizabeth c. 4 § 15.
[5] 5 Elizabeth c. 4 § 18.
[6] Above 342.
[7] Above 317.
[8] Cunningham, op. cit. ii 109-111; Tawney, The Agrarian Problem in the Sixteenth Century 188-189.
[9] Republic Bk. i c. 23.
[10] Thus Sir Thomas Smith, speaking of the yeomen (Republic Bk. i c. 23) says, "these be (for the most part) fermors unto gentlemen, which with grasing, frequenting

of the improved social position which the ownership of land conferred upon themselves or their descendants.[1] Sermon writers and satirists constantly denounced this tendency;[2] and Thomas Cromwell once thought of passing an Act to prohibit merchants from purchasing land of a greater value than £40 a year.[3] No legislation on these lines was proposed. The extravagance of Henry VIII.'s court,[4] and the dissolution of the monasteries, brought much land into the market, and any could buy land who could afford it. It was fortunate, not only for the agricultural industry, but also for the welfare of the country as a whole, that this was so. The new race of landowners were generally thrifty and enterprising; and they soon became imbued with some of the best traditions of the class to which they had attained.

We have seen that it was on the land-owning class that the burden of carrying on the government mainly fell. And, just as the system of government which it was called upon to administer retained many mediæval traits, and yet was essentially modern in its subordination to law and central authority; so this new race of landowners retained the best feature of feudalism in that they continued to perform faithfully unpaid public services, and yet proved to be efficient officials of a modern state. No other country could show either a system of government or a body of administrators possessing this curious blend of mediæval and modern characteristics. It is, in fact, this blending of the characteristics of the mediæval baron with those of the modern enterprising landowner which is the distinctive feature of the English aristocracy of the seventeenth and eighteenth centuries —an aristocracy reminiscent of feudalism in its connection with the land and its performance of public duties, but eminently modern and efficient because it was constantly recruited from successful men in all walks of life.[5] Like so much else that is

of marcettes, and keeping servants not idle as the gentleman doth . . . doe come to such wealth," that they make their sons gentlemen.

[1] Cunningham, op. cit. ii 111, 112; Aydelotte, op. cit. 17.

[2] Johnson, op. cit. 76 and references there cited; see Crowley, Last Trumpet (E.E.T.S.) 87.

[3] L. and P. ix no. 725 *ii* Cromwell's remembrances—"that an act be made that merchants shall employ their goods continually in traffic, and not in purchasing lands; and that craftsmen shall continually use their crafts in cities and towns, and not take farms in the country; and that no merchant shall purchase more than £40 lands by the year."

[4] A Supplication to Henry VIII. (E.E.T.S.) Extra Series xiii 52 (published 1544).

[5] Mr. Johnson, Disappearance of the Small Landowner 83, 84, gives an excellent description—"At the head of this powerful, and to a great extent homogeneous aristocracy, stood the peers, closely connected with the largest of the squires by social, if not by blood, ties—a class into which their younger children were ever descending and from which they were ever being recruited; while the body of the country gentry, who formed the great bulk of this curious aristocracy, was ever being added to from below by the admission into their ranks of the successful lawyer, the banker, merchant, or other prosperous man of business or affairs."

characteristic of modern England, it came with the sixteenth century; and it is to the industrial and agrarian changes of that century that we must ascribe its origins. Just as the physical result of these industrial and agrarian changes was the creation of our familiar English landscapes of inclosed fields and trees and hedges, so its political result was the creation of this new governing class, whose achievements during the three following centuries have played no inconsiderable part in making the British empire of to-day. If we remember that it controlled the local government of the country from the sixteenth to the nineteenth centuries; that it led the struggle for constitutional government in the seventeenth century; and that, in the eighteenth century, it helped to lay the foundations of the British dominions beyond the seas, and added to the world's stock of political ideas by evolving the system of cabinet government—we must admit that it has a record which few aristocracies can show.

(ii) *The food supply and prices.*

Though the government had no desire to discourage agrarian changes which made for the greater productiveness of the land, it had no intention of allowing all the profit of this increased productiveness to go to the producer. It desired rather to see its results so distributed that all parts of the country and all members of the community should be supplied at reasonable rates. In the interests of the consumer, and especially of the poorer class of consumers,[1] it took immense pains to secure this result; and on the whole its efforts were successful.[2] Its measures mitigated the effects of times of scarcity, and thus took away the occasion for those disorders which such times often provoke.[3] I must, in the first place, say a few words as to the measures which the government took to accomplish this result; and, in the second

[1] Thus in 1596 it directed the justices near Nantwich to enquire into the ingrossing of corn by the richer persons of that town, and "to cause restraincte to be made of suche unlawful buying and selling of corne to the hindrance of the poore . . . and to take order the poore sort may be first served," Dasent xxvi 399.

[2] Cunningham, op. cit. ii 92, "the scarcity orders issued by the Privy Council seem to have been fairly successful in giving the poor full advantage of an existing stock of grain." Dr. Cunningham goes on to say that "they would tend to reduce the regular profit of corn growing," and that they "lay down principles of equity and fair dealing which were hardly consistent with the continued prosperity of agriculturists;" however he admits, ibid 98-107, that as a result of the Elizabethan policy agriculture was flourishing; as Miss Leonard says, Early History of Poor Relief 195, "the strongest argument that on the whole these measures were beneficial is to be found in the fact that they were enforced throughout the country by the justices with very few protests. The justices would as a rule be landowners and generally corn owners; the regulations were against their interests, and, unless they had thought that they contributed to the public welfare, they would have complained more and performed less."

[3] Acts of the Privy Council (1613-1614) 457-458, 652-653; Cunningham, op. cit, ii 98; cf. Leonard, Early History of Poor Relief 51.

place, I must deal with the rules of law under which these measures were taken.

(a) The measures taken by the government to ensure an adequate food supply and due distribution.

In the days when facilities for transport were defective it might well happen that a time of plenty in one part of the country was a time of scarcity in another part.[1] The Council, through the justices,[2] through special local commissioners for grain or victuals,[3] and, in the towns, through the clerks of the market,[4] kept themselves well informed as to the supplies existing in all parts of the country. This knowledge enabled it in a time of scarcity to permit large towns like London or Bristol to draw on the neighbouring counties for supplies; and at the same time, by limiting the amount of these supplies, to prevent the demands of the urban districts from causing a famine in the rural districts.[5] It enabled it to decide whether the price of corn was sufficiently low to justify the exercise of the statutory permission to export, or whether the price was so high that permission must be withdrawn.[6] With a view of preventing or mitigating the effects of a time of scarcity it kept a strict supervision over the corn badgers and other local dealers in provisions[7]—a task which was facilitated by the statutes which compelled these persons to be licensed.[8] Moreover it used its powers to compel owners to bring their stocks of provisions to the markets and to

[1] Leonard, op. cit. 195 n. 4 gives some illustrations of such fluctuations.

[2] Thus in 1586 and 1587 we get reports from the justices as to the measures taken to deal with scarcity in accordance with the Council's orders, Leonard, Early History of Poor Relief 87-89 and App. iv.

[3] For references to the commissioners see Select Cases in the Star Chamber (S S.) ii *xxiii* seqq.; Dasent viii 147, 167 (1573); ix 52-53 (1575)—a Sussex commission to be renewed to stop excessive export; ibid 210, 211—general renewal of commissions on account of scarcity; xviii 220 (1589)—a direction to commissioners of certain counties not to allow grain to be sent out of the country.

[4] For their functions see vol. i 150; Cunningham, op. cit. ii 94-07.

[5] Dasent ii 378 (1549-1550)—Bristol; xxvi 226 (1596)—Bristol; viii 135 (1573)—London; ix 206 (1576)—London; xiv 319, 320 (1586-1587)—London; xxviii 42-44 (1597)—London; cf. xxvi 116-117 (1596)—scarcity in Norfolk, and purchase by Londoners objected to.

[6] 17 Richard II. c. 7; 14 Henry VI. c. 5; 15 Henry VI. c. 2; 3 Edward IV. c. 2; 1, 2 Philip and Mary c. 5; 5 Elizabeth c. 5 § 17; 13 Elizabeth c. 13; 35 Elizabeth c. 7 § 5; 1 James I. c. 25 §§ 2, 3; 21 James I. c. 28 § 4; 3 Charles I. c. 5 § 6—these statutes generally required a royal licence, for the grant of which the crown was in a position to demand payment; 13 Elizabeth c. 5 fixed a duty of 1s. per quarter raised by 35 Elizabeth c. 7 to 2s.; the price which corn must fetch before export was allowed was fixed; but it was provided that the Queen might always prohibit export; cf. Select cases in the Star Chamber (S.S.) ii *xxvi-xxix;* for a direction of the Council enforcing this legislation see Acts of the Privy Council (1613-1614) 209-210.

[7] Dasent viii 108 (1573); xxx 733-735 (1600); Hawarde, Les Reports, etc. 71.

[8] 5, 6 Edward VI. c. 14 § 13 (drovers of cattle); 5 Elizabeth c. 12 (badgers of corn and drovers of cattle).

sell them at reasonable rates.[1] It even commandeered the cargoes of native[2] or foreign ships[3] in English ports, and compelled a sale at the current market price. There can be no doubt that the information acquired by the Council and diffused throughout the country, and the constant action taken or directed by it, was of great benefit to the consumer. But, it may be asked, what legal warrant had the Council to exercise these large powers? The answer is that the statutory strengthening of the common law, both as to forestalling, regrating, and ingrossing, and as to combinations to raise the prices of food, coupled with the prevailing economic idea that it was the duty of the government to see that a just price was charged,[4] permitted it, with public approval,[5] to assume this wide authority to suppress practices which appeared likely to hinder the adequate supply and the fair distribution not only of food, but also of other commodities. These branches of the law thus played an important part in the economic scheme of the sixteenth and seventeenth centuries; and they were still existing law when Blackstone wrote.[6] Of them, therefore, I must say something.

(*b*) *The rules of law under which the government acted.*

In 1551-1552 the legislature defined the offences of forestalling, regrating, and ingrossing.[7] A forestaller was defined as a person who purchased or contracted to purchase goods while on their way to a market, or who attempted by any means to enhance the price of such goods, or who persuaded persons not to come to the market or not to bring goods to market. A regrator was defined as a person who bought corn or other provisions in a market and sold the same again in the same market or at another market within a radius of four miles. An ingrosser was defined as a person who bought up growing corn or other victuals in order to sell them again. These definitions were intended to give precision to an old branch of the common law,[8] enforced by earlier statutes,[9] but never accurately defined. We have seen that in the Middle Ages it was considered that prices should be

[1] Dasent v 84 (1554); xxvi 380 (1596); cf. the scarcity orders of 1586, Leonard, op. cit. 87 and App. v.

[2] Dasent xiv 155 (1586).

[3] Ibid xxvi 445-447, 454, 545-547 (1596-1597).

[4] Above 319, 347, 350.

[5] Above 373 n. 2.

[6] Bl. Comm. iv 158, 159.

[7] 5, 6 Edward VI. c. 14 §§ 1-3.

[8] Statutes of Uncertain Date i 202 (Rec. Com.), "Nullus Forestellarius in villa patiatur morari, qui pauperum sit depressor manifeste, et totius communitatis, et patriæ publicus inimicus;" for the position of these so-called statutes see vol. ii 222-223.

[9] 25 Edward III. st. 4 c. 3; 27 Edward III. st. 2 c. 11; 28 Edward III. c. 13 § 3 cp. vol. ii 469.

determined, not by the law of supply and demand, but by considering what amount would be a fair return to the producer, having regard to the cost of production; and that consequently any manipulation of the market with a view of manipulating the price in the interests of either buyers or sellers was illegal.[1] It was operations of this kind which were called forestalling; and clearly the prohibition of this sort of conduct rested on a principle analogous to the prohibition of usury,[2] in that both prohibitions were designed to secure the fairness of mutual dealings between man and man.

In the Middle Ages the law as to forestalling was strictly enforced, generally in the local courts both of the country at large and of the boroughs,[3] and sometimes in the courts of common law. A case reported in one of the books of Assizes[4] illustrates its scope. The report tells us that a Lombard was indicted in London for various offences, and among others for practising by words to enhance the price of merchandise. It was suggested on his behalf that, as his words had not had the effect intended, and no damage had been done, he had committed no offence. But this plea was over-ruled; "and Knivet said, that certain people (whom he named) came into the district of the Cotswolds, and, in deceit of the people, spread the report that there were such wars in foreign parts that no wool could pass the sea in the following year, by reason of which report the price of wool was lowered. And they came before the king's Council, and could not deny that they had done this, by reason of which they were put to fine and ransom; and this case cannot be distinguished."

The new economic conditions of the sixteenth century naturally demanded a reconsideration of the old doctrines. The view which the legislature took was that the old doctrines must be relaxed somewhat in certain defined cases, e.g. corn could be ingrossed if the price fell below a certain limit;[5] but that, with a view to the preservation of the peace of the state and the welfare of the community, they must, except in the defined cases, be rigidly applied to regulate the internal trade of the country. With this object in view the legislature defined the offences and imposed severe penalties on those who committed them.[6] Moreover, it was not content with passing Acts against practices which

[1] Above 344 and n. 6; vol. ii 468-469. [2] Pt. II. c. 4 I. § 1.

[3] Vol. ii 390; an article against forestalling occurs in the charge to the Sessions, The Book for a Justice of the Peace, Berthelet (1543) f. 21; and in the charge of the Leet, Modus Tenendi etc., Berthelet (1543).

[4] 43 Ass. pl. 38.

[5] 5, 6 Edward VI. c. 14 § 10; for another statutory modification in the case of the butter and cheese trade see 21 James I. c. 22.

[6] Ibid § 4.

enhanced prices. It endeavoured to fix directly a fair price not only for victuals but also for other commodities. Thus in Henry VII.'s reign Acts were passed which fixed the price of cloth and of caps.[1] In 1511-1512 an Act was passed to regulate the mode of fixing the price of victuals in corporate towns where the head officer was a victualler;[2] in 1532-1533 the maximum prices for meat were fixed;[3] in 1533-1534 a general Act was passed to provide that if the price of victuals was unreasonably enhanced in any part of the kingdom, the Council should be able to fix a reasonable price;[4] in 1552-1553 the price of wine sold by retail was fixed.[5] The legislature also endeavoured to suppress combinations to raise the price of victuals. There can be little doubt that these combinations were unlawful at common law—they were a form of forestalling.[6] But here again a further definition of the law was thought to be desirable. In 1548 it was enacted that if any butchers, brewers, bakers, poulterers, cooks, costermongers, or fruiterers should conspire not to sell their victuals but for a certain price, they should be punished as provided by the Act; and that if any society or company of victuallers were guilty of this conduct such society or company should be dissolved.[7]

The Council, the local authorities, and the common law courts actively enforced this legislation.

Cases in which their infringement was complained of frequently came before the court of Star Chamber;[8] and the records of the Council contain many entries as to the suppression of forestalling and ingrossing,[9] and orders to dealers in victuals and other commodities as to the prices at which they must sell their goods.[10] In fact the prevailing economic idea that the price charged for a commodity ought to be just gave the Council a very free discretion to issue orders upon this subject. Thus in 1596 it issued a proclamation to the effect that the badness of the season and consequent scarcity did not justify those who held

[1] 4 Henry VII. cc. 8 and 9; see above 302 for the proclamations on this subject.

[2] 3 Henry VIII. c. 8.

[3] 24 Henry VIII. c. 3.

[4] 25 Henry VIII. c. 2.

[5] 7 Edward VI. c. 5; above 302.

[6] Vol. ii 467-471.

[7] 2, 3 Edward VI. c. 15.

[8] Select Cases in the Star Chamber (S.S.) ii *xxi-xxxviii*, and references there cited; Hawarde, Les Reports etc. 75-76; Atty.-Gen. v. Archer (1632) Rushworth vol. ii Pt. ii App. 38; Atty.-Gen. v. Taylor (1632) ibid 41-42; Atty.-Gen. v. Fowkes (1634) ibid 58; cf. Cases in the Star Chamber (C.S.) 43, 82.

[9] E.g. Dasent viii 192 (1573-1574); ix 386 (1577); xvi 348 (1588); xx 153, 156 (1590); xxvii 359-361 (1597); xxx 733-735 (1600); Hawarde, Les Reports etc. 91; above 301-302 for some account of the proclamations issued on this subject.

[10] Dasent i 163 (1545)—inn-keepers; ibid 192—bowstaves; iii 366 (1551)—cattle; x 126 (1577)—wine; xi 50 (1578-1579)—oil; xxxii 67, 68—coal; E.H.R. xiii 713; above 302 for some account of the proclamations issued on this subject.

stocks of corn from raising the price,[1] and conversely, in 1619 it told the justices that the goodness of the season did not justify sales at unremunerative rates.[2] Such statements are a strong illustration of the tenacity with which the mediæval view that price should be determined by considerations of justice and equity was held all through this century.

The municipal authorities[3] and the justices of the peace[4] co-operated with the Council, acting either on its directions or independently. Nor were the common law courts behind hand in their strict enforcement of the law. Coke tells us[5] that in 1598, "it was upon conference and mature liberation resolved by all the justices that any merchant, subject or stranger, bringing victuals or merchandise into this realm, may sell them in gross, but that the vendee cannot sell them again in gross, for then he is an Ingrosser . . . and may be indicted thereof at the common law, as for an offence that is *malum in se.* (2) That no merchant or any other may buy within the realm any victual or other merchandise in gross, and sell the same in gross again, for then he is an Ingrosser and punishable *ut supra:* for by this means the prices of victuals and other merchandise shall be inhaunced, to the grievance of the subject; for the more hands they pass through the dearer they grow. . . . And if these things were lawful, a rich man might ingross into his hands all a commodity, and sell the same at what price he will. And every practice or device by act, conspiricy, words, or news to inhaunce the price of victuals or other merchandise was punishable by law." No doubt these restrictions were irksome to the traders; and sometimes they tried to effect impossible things. It was impossible, for instance, to keep prices at their original low level when the value of money was falling, in consequence of the greater abundance of the precious metals; and the more elaborate organization of trade, which came in later days with its expansion, necessitated some relaxation and some re-statement of old doctrines—just as in our own days it has been necessary to relax and re-state the

[1] See the Proclamation of July 31st, 1596, cited Cunningham, op. cit. ii 93 n. 2; cf. above 318 n. 2 for the same idea expressed by Crowley.

[2] Leonard, op. cit. 203 citing a letter of the Council to the Justices in which they were urged to establish a magazine for surplus corn because it is, "the care of the state to provyd, as well to keepe the price of corne in tymes of plenty at such reasonable rates as may afford encouragement and lively good to the farmer and husbandmen, as to moderate the rates thereof in time of scarcitie for the releefe of the poorer folk."

[3] See the instances collected by Miss McArthur, E.H.R. xiii 711-714; at pp. 714-716 a full account of an assessment of prices for Woodstock for 1604 is given; sometimes the municipalities established town stores, see Leonard, Early History of English Poor Relief 23-25 (London); ibid 40, 41 (Bristol and Canterbury); 122, 123 (Bristol); 188 (London).

[4] Leonard, op. cit. 120, 121.

[5] Third Instit. 196.

old common law rules as to contracts in restraint of trade. But in this period they certainly mitigated the hardships of times of scarcity; and they were not incompatible with the prosperity of either trade or agriculture.

The influence of the economists of the school of Ricardo secured the repeal of all this legislation in 1825;[1] and the offences of forestalling, regrating, and ingrossing were abolished in 1844.[2] But the use which traders have made of their freedom has shown that the Elizabethan judges were not wholly mistaken in their opinion that, "if these things were lawful a rich man might ingross into his hands all a commodity, and sell the same at what price he will." Trusts and combinations formed for this very object are phenomena not unknown to the modern world of commerce. They perhaps show that the common law doctrines as to forestalling and regrating were founded upon a knowledge of some very ineradicable human weaknesses; and that they had therefore at bottom a fundamental reasonableness which would have enabled them to be sufficiently developed and modified, as many other common law doctrines have been developed and modified, to remedy the same weaknesses appearing in another environment and under different forms. Possibly it may in the future be necessary to re-assert and enforce the principle at the back of these old doctrines, even as it has been found necessary to re-assert and enforce the principle at the back of the usury laws.[3]

The repeal of this legislation has also reacted upon the law as to the relation between employer and workman. When producers were compelled to sell at a fair price, when all devices to create an artificial price were illegal, there was nothing unjust in compelling the workman to sell his labour at a fair wage. It is clear, however, that when freedom of action was allowed to producers in their dealings with the public, the same freedom could hardly be denied to workmen in their dealings with their employers. But the intimacy of the relations between branches of the law which, before the Great War, modern legislation had unfortunately persisted in regarding as distinct, will appear more clearly when I have examined the Tudor legislation upon the topic of employer and workman.

(3) *Employer and Workman.*

When the sixteenth century opened, the law as to employer and workman depended upon the Statutes of Labourers, and

[1] 6 George IV. c. 129. [2] 7, 8 Victoria c. 24 § 1.

[3] 63, 64 Victoria c. 51 (The Money-lenders Act 1900). This was written before the Great War; many of the regulations made during the war to mitigate the food shortage caused thereby, show a reversion to these old principles which were permanently necessary at a period when shortage of the food supply was an ever-present fear.

upon the case law which had grown up around them.[1] The earlier legislation of the Tudor period merely modified in certain details the mediæval statutes.[2] But, in 1562-1563,[3] the whole of this legislation was reconsidered. The main principles of the earlier law were adopted; and the law itself was codified, and adapted to the needs of the sixteenth century. The statute deals with three of the most important aspects of the labour question—the technical education of the worker, the supply of labourers and its distribution as between the agricultural and other industries, and the relations between employer and workman. With the first two of these topics I have already dealt.[4] I must now describe the manner in which this statute dealt with the third problem, and indicate its relations to the earlier legislation.

We have seen that certain definite principles underlay the mediæval statutes of Labourers.[5] Seeing that the Elizabethan legislation is a development and a modification of these principles,[6] we shall understand it better if we take these principles in order, and examine how far it extended or modified them.

In the first place all persons coming within certain categories defined by the statute and able to work must do so. This principle is distinctly recognized by the third and seventeenth sections of the statute. The former section applied to men and the latter to women. But it should be observed that if the workman was not free to decline to serve, the employer was not wholly free to dismiss him as he pleased. On several occasions in the sixteenth and early seventeenth centuries the Council intervened to compel

[1] Vol. ii 459-464.

[2] 11 Henry VII. c. 22, repealed by 12 Henry VII c. 3; 4 Henry VIII. c. 5; 6 Henry VIII. c. 3; 7 Henry VIII. c. 5—special rules for certain trades in London.

[3] 5 Elizabeth c. 4. [4] Above 341-342, 371. [5] Vol. ii 460.

[6] "Althoughe there remayne . . . a great nomber of Actes and Statutes concerning the reteyning departing wages and orders of Apprentices Servantes, and Labourers, as well in Husbandrye as in dyvers other Artes Misteries and occupacions, yet partly for thimperfecion and contrarieties that ys found and doo appeare in sundrye of the sayd Lawes . . . and chiefly for that the wages . . . lymytted . . . in many of the sayde Statutes, are in dyvers places to small and not answerable to this tyme respecting the advancement of Pryses . . . the said Lawes cannot conveniently without the greate greefe and burden of the poore Labourer . . . bee put . . . in due execution: and as the sayd severall Actes . . . were at the time of making of them thought to be very . . . beneficiall for the Commonwealthe of this Realme as dyvers of them yet are, so if the substance of as many of the said Lawes as are meet to be continued shalbe digested . . . into one sole Lawe . . . there ys good hope . . . that the same Lawe . . . should banishe Idleness advance Husbandrye and yealde unto the hired person bothe in the tyme of scarsitee and in the tyme of plentye a convenient proporcion of Wages," 5 Elizabeth c. 4 Preamble; the Act then goes on to provide (§ 1) that "As muche of the Estatutes heretofore made, and every branche of them as touche or concerne the hiring keping departing woorcking wages or order of Servantes Woorckmen Artificers Apprentyces and Labourers . . . shalbe . . . repealed; and that all the said Statutes . . . for any matter . . . not repealed by this Statute shall . . bee in full force."

clothiers to go on manufacturing, although there was no market for their goods.[1] In 1586, for instance, it put pressure both upon the clothiers to go on with their manufacture, and upon the Merchant Adventurers to go on buying, in order that there might be no unemployment.[2] In the printing trade the orders of the Star Chamber made it obligatory upon the master printers to provide work; and this obligation was maintained by the licensing Act of Charles II.'s reign.[3] Similarly the number of copies to an edition was deliberately limited in order to find work for the compositors; and all attempt to evade this rule by keeping the formes of type standing were suppressed.[4] It is true that the duty to provide work was not a statutory duty, nor perhaps a common law duty. But a duty enforced by the Council was far from being a merely moral duty. The idea that such a duty ought to be enforced was in harmony with the economic ideas of the period—it is clearly analogous to the idea that a time of scarcity did not justify the vendors of foodstuffs in selling at an excessive price;[5] and thus the Council, having public opinion on its side,[6] was able to enforce it as if it were a legal duty.

In the second place workmen must work at a reasonable rate of wages. We have seen that it had already been recognized that the ascertainment of this rate must depend upon the price

[1] Cunningham, op. cit. ii 50, citing instances of such action by the Council in 1528, 1586, 1591, 1622, 1623; S.P. Dom. (1619-1623) 343, cxxvii no. 76; ibid 358, cxxviii no. 49; ibid 362, cxxviii no. 67; Leonard, op. cit. 47-49, 147-149, 152, 153; the manner in which foreign trade was organized, above 320-322, enabled this pressure to be applied with effect; as Miss Leonard points out, op. cit. 152, 153, the Council could tell the Merchant Adventurers that if they would not buy the cloth the trade would be thrown open; thus "the London merchants had to choose between competition from rivals or the loss involved in buying the stocks in the manufacturer's hands;" the results were sometimes disastrous to the employers, see S.P. Dom. (1637) 64, cccIv no 67.

[2] Dasent xiv 272-274; in the same way inventions were discountenanced that produced unemployment, above 354 and n. 7; cf. Tudor and Stuart Proclamations i no. 1139 (1613)—the import of felts, hats, and caps was stopped because it threw people out of work.

[3] Vol. vi c. 7.

[4] Arber, A Transcript of the Stationers' Register ii Introd. 23; ibid 883—orders of the Stationers' Company made in 1587, and see iv 21-23; as Arber says, ibid iv 26, "In Elizabeth's reign a large London impression only meant so much less demand for a compositor's skill, and consequently oftentimes so much loss of daily bread. So that between Master and Journeyman printers, there was always a strife over standing formes of type; whereby the type being kept undistributed for a while, might obviate the necessity of a fresh composition for a second edition."

[5] Above 377-378.

[6] Cunningham, op. cit. ii 50; cf. E.H.R. xiii 91-93; in 1622 the Council lay it down that "the rule by which the wool-grower, the cloathier and merchant must be governed," is, "that whosoever had a part of the gaine in profitable times since his Majestie's happie raigne must now in the decay of Trade . . . beare a parte of the publicke lossess as may best conduce to the good of the publicke and the maintenance of the generall trade," cited Leonard op. cit. 148; S.P. Dom. (1639-1640) 38, ccccxxxi no. 22—report on an inquiry ordered by the Council into certain trade disputes, including the dismissal of workmen.

of necessaries.[1] The Act of Elizabeth fully recognized this principle. It provided machinery for periodically fixing this rate, and it did not attempt to prescribe, as some of the earlier Acts had prescribed, a maximum amount. The rate was to be fixed annually by the justices of the peace at the Easter sessions, and, by the 12th of July, it was to be returned unto the Chancery engrossed on parchment, together with the justices' reasons for thus fixing the amount. It was then to be approved by the Council, and by the Council sent down to the sheriffs to be proclaimed.[2] The justices also were required to "make a special and diligent enquiry of the branches and articles of the statute, and of the good execution of the same."[3] A special allowance was made to them for the extra work imposed upon them by the Act; and a penalty was imposed on justices absent without good cause from the sessions held to fix the rates of wages.[4] Evidence is accumulating that the Council was quite ready to intervene if the wages were not regularly or not fairly fixed by the justices in accordance with the Act,[5] or if employers did not pay them.[6] It appears, too, from a later Act of 1597[7] that the scheme was working satisfactorily. This later Act made it quite clear that the provisions of the earlier Act applied to all classes of workmen, and made a slight change in the method of procedure by dispensing with the certificate into Chancery and the approval of the Council.[8] It should be noted also in this connection that the same Act of Edward VI. which declared that combinations of producers to raise the price of victuals were illegal, applied also to combinations of workmen to raise the rate of wages.[9] With regard to other incidents of the contract of employment the Act

[1] Vol. ii 460; E.H.R. ix 313, "Between 1389 and 1562 the statute book is silent on the matter of a sliding scale, and the justices are not mentioned after 1429 as the authority by whom wages should be fixed; but in the 'Boke of Justyces' of 1510, as well as in the 'New Boke' of 1538, it is stated that they have authority to execute 13 Ric. II. st. i c. 8;" cf. ibid xiii 299-302 for a note as to a fifteenth century assessment of wages; 1 James I. c. 6 extended the Act to all labourers, weavers, and spinners.

[2] 5 Elizabeth c. 4 § 11. [3] § 30. [4] §§ 12 and 31.

[5] E.H.R. xiii 91-93; ibid 522-527; xv 445-455—Miss McArthur shows that in the city of London wages were regularly assessed in accordance with the statute during the sixteenth century; in 1588 the Council had received them from all the counties and towns, Dasent xvi 168; above 303 for the proclamations on this subject; Leonard, op. cit. 161-163.

[6] S.P. Dom. (1637) 44, cccliv no. 153, a baymaker who had paid in commodities instead of money was ordered to make restitution; and, on further hearing of the case, ibid 87-89, ccclv nos. 162-164, he was committed to the Fleet till he paid double the amount of wages of which he had defrauded the petitioners, withdrew all actions against the men, and paid their charges in coming to London.

[7] 39 Elizabeth c. 12—"Forasmuch as the said Lawe hathe beene founde beneficiall for the Common Welth."

[8] 39 Elizabeth c. 12 §§ 3 and 4; § 2 allows wages to be rated in sessions for divisions of shires.

[9] 2, 3 Edward VI. c. 15.

followed earlier precedents by prescribing that, in a large number of specified employments, the hiring must be for one year, and that a quarter's notice must be given to terminate the contract by either employer or workman;[1] but these rules did not apply in the case of workmen hired by the day or week, or to do a particular piece of work.[2]

In the third place wrongful dismissal, wrongful departure, a refusal to work at the statutory rates, or the giving or receipt of wages in excess of the statutory rates, were offences under this, as under the earlier Acts.[3] The observance of some of these provisions was secured by clauses, also to be found in another form in some of the earlier Acts,[4] which required a workman to produce letters testimonial in a form fixed by the statute showing that he was free to hire himself, and prohibited employers from engaging workmen who could not show a testimonial in proper form.[5]

In the fourth place the provisions of some of the earlier Acts as to assaults on employers, and as to the machinery for arresting fugitive servants, were re-enacted.[6]

It will be observed that the statute did not in terms give any right of action against a person who entices or procures another to depart from the service of his employers. Nor was such a right of action expressly given by the earlier statutes. But the courts had ruled that by implication they had conferred such a right of action,[7] and the legislature had indirectly sanctioned this view.[8] The existence of this right of action was not affected by the repealing clause of the statute of Elizabeth,[9] and, accordingly the courts held that it still existed.[10] But there was some difference of opinion as to the conditions under which it lay. The majority of the court in *Adams and Bafeald's Case*[11] held that it would only lie if a procurement or enticement could be shown; and that the mere retainer of a person known to be another's servant would not suffice. But Gawdy C.J. dissented from this

[1] 5 Elizabeth c. 4 §§ 2 and 4; cf. 23 Henry VI. c. 12; perhaps this clause gave rise to the presumption, which at one time existed, that an indefinite hiring was a yearly hiring, cf. Co. Litt. 42b; Fawcett v. Cash (1834) 5 B. and Ad. 904.

[2] 5 Elizabeth c. 4 §§ 9 and 10.

[3] §§ 4, 6, 13.

[4] 12 Richard II. c. 3.

[5] 5 Elizabeth c. 4 §§ 7 and 8.

[6] §§ 14 and 39.

[7] The ordinance of 23 Edward III. had enacted, § 2, that no workman depart before the end of the agreed term, "et nullus sub eadem pena (imprisonment) talem in servitio suo recipere vel retinere presumat;" thus a person who retained another's servant committed an offence under the Act, and the courts deduced from this the existence of a civil right of action, vol. ii 460 n. 3.

[8] See 3, 4 Edward VI. c. 16 § 11, which gives this right of action under the Statutes of Labourers to masters against those who had enticed away persons apprenticed under the Act.

[9] Above 380 n. 6.

[10] Adams and Bafeald's Case (1591) 1 Leo. 240.

[11] 1 Leo. 240.

view; and his opinion seems to be more in accordance with the older authorities, which allowed a cause of action if a person refused to give up a servant after notice of an employer's claim.[1] In 1795 [2] the court of King's Bench adopted Gawdy's opinion. It based its decision on the general ground that "a person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other can employ such servant to the prejudice of the first master." [3] The Statutes of Labourers were not mentioned either in the argument or the judgment; and from this we may conclude that the older idea that the contract of employment gave the employed a sort of special status was disappearing. Since relationship of master and servant was regarded as contractual, the cause of action was regarded as consisting of the fact that a breach of the contract of service had been facilitated. Knowingly [4] to retain a servant after notice of the employer's claims, was regarded as facilitating such breach—"the very act of giving him employment is affording him the means of keeping out of his former service." [5] Thus the idea that the master has something in the nature of a real right to his employee's services was retained in a form adapted to the purely contractual basis which the relationship had then assumed. But this new conception of the nature of the cause of action paved the way for the idea that the gist of the action was the causing of a breach of contract; and for the enormous extension which was given to that cause of action by the decision in *Lumley* v. *Gye*,[6] that a persuasion to break any contract gives a like cause of action.

In this way a cause of action, introduced into the common law by the fourteenth century legislation which had created a special status for the servant or workman in relation to his employer,[7] gradually came to be considered, as the contractual aspect of that relation assumed greater prominence, first as a peculiar incident annexed to the contract of service, and then as an incident annexed to all contracts.[8] As a result

[1] Vol. ii 462; cf. Lumley v. Gye (1853) 2 E. and B. at pp. 255-258; it may also be noted that the machinery of letters testimonial provided by the Act of Elizabeth would make it very difficult to engage another's servant without committing an offence under the Act; and this fact, taken in conjunction with the interpretation put upon the earlier Statutes of Labourers, was a reason for giving the right of action in accordance with Gawdy's view.

[2] Blake v. Lanyon 6 T.R. 221. [3] Ibid (1795) 6 T.R. at p. 222.

[4] F.N.B. 168 c.; Hart v. Aldridge (1774) 1 Cowp. at p. 56 *per* Lord Mansfield.

[5] Blake v. Lanyon.

[6] (1853) 2 E. and B. 216. [7] Vol. ii 460 n 3, 461-463.

[8] After the decision in Lumley v. Gye it might perhaps be both more logical, and more in accordance with the course of the historical development of the law, to hold that contracts of service are governed by the same law as any other contracts, and that therefore an action will only lie against a person who intereferes with such a

of these developments, and of the freedom of action allowed by our modern law both to employers and employed, a new chapter of the greatest importance has been added to that branch of legal doctrine which is on the border line between contract and tort.

In modern times the Elizabethan law as to employer and workman has often been severely criticized. The attempt to fix the rate of wages has been treated either as a vain attempt to do an impossible thing, or as an enactment made for the purpose of keeping wages down in the interests of the employer; and in support of the latter view the prohibition of all combinations to raise wages has been adduced. The obligation of all to serve at their trades has been treated as another instance of the manner in which the legislature exploited the labourer for the benefit of the employer; and the fact that the workman who broke his contract was liable to imprisonment, while the employer was liable only to a pecuniary penalty and a civil action for breach of contract, is regarded as another instance of legislative favouritism. But most of these criticisms are based upon a one-sided view. They look at the law affecting the workman without looking at the law affecting the employer. In fairness to the Elizabethan legislators we must take the same comprehensive view of the situation that they took, and consider these laws affecting the workman both in relation to the laws affecting the employer, and in relation to the general economic ideas which they assumed as a basis of their legislation.

We have seen that the rules as to fixing the rates of wages were intended to be, and, so far as our evidence goes, were enforced with the object of giving the workman a living wage. They were rules which provided a sliding scale for the raising or lowering of wages as the cost of living was raised or lowered. This method of ascertaining the rate of wages was correlative to the method of ascertaining the prices of food and other commodities. In both cases public authority intervened, on the one hand, to prevent the workmen charging too much or getting too little, and on the other, to prevent the producer from charging an excessive price, having regard to the cost of production. Now if public authority intervenes to fix wages and prices on a basis of fairness and justice, it is clear that it cannot allow either

contract if he has intentionally persuaded the servant to break it without just cause or excuse. Perhaps it would still be open to the House of Lords or even the court of Appeal so to state the law. But there is authority to show that the older law as to master and servant has survived to this extent, that if a person knowingly harbours a servant who has wrongly left his master (even though he did not persuade him to leave his service), he is liable to an action, Clark and Lindsell, Torts (4th Ed.) 222; Lord Halsbury, Laws of England xx 269, 270. In other words, the literal decision in Blake v. Lanyon is still law, in spite of the new basis upon which this branch of the law was put by the case of Lumley v. Gye.

workman or employer to disturb this settlement. It cannot allow workmen to combine to get more; and equally it cannot allow the employer to get more by similar combinations, or by such operations as forestalling, ingrossing, or regrating. The workman was, it is true, obliged to serve: but this obligation to serve was correlative to the obligation to employ. We have seen that the government insisted that in bad seasons the employer was not free to dismiss his men as he pleased. If in good seasons he got labour at a fixed wage, in bad seasons he must keep the labourer and pay the same wage. With regard to the difference of remedy the legislature took the sane view that it is to the interest of the state that contracts be kept; and that, as a pecuniary penalty and a civil action for damages are useless remedies against a man with no estate, other more efficient remedies must be provided. The poor man because he is poor cannot be allowed to break his contract as he pleases. We may if we please consider that the Elizabethan legislator was attempting the impossible when he thus tried to regulate wages and prices; but we must admit that he applied his rules fairly to both the employer and the workman. In neither case did he allow entire freedom of contract.

In truth, until political economists of the earlier half of the nineteenth century converted the legislature to the belief that freedom of contract was the cure for all social ills, no one ever imagined that wages and prices could be settled merely at the will and pleasure of the parties to each particular bargain; or that the contract between employer and workman could be regarded as precisely similar to any other contract. We have seen that the legislature considered, with some reason, that to allow prices to be thus fixed would lead to manipulations of the market in the interests of producers or vendors—to forestalling and regrating, or, to use modern terms, to corners and trusts. Similarly it considered, and with equal reason, that the price of labour could not be fixed in this way; and that having regard to the position of the parties to the contract, special remedies for its breach must be devised. It saw that to leave the wage of the workman to be determined by the bargain between the parties was not fair to the workman because it put the economically weak at the mercy of the economically strong; and that to threaten merely a pecuniary penalty and an action for damages for breach of contract against an insolvent workman was no remedy at all. In the interests of the workman the wage must be fixed: in the interests of the employer there must be something more than a merely pecuniary penalty for the breach of the workman's contract.

In the early years of the nineteenth century the statutes which had imposed restrictions on the freedom of employers to manipulate prices were obsolete; and in 1825 and 1844 they were, as we have seen, repealed.[1] Prices were therefore left to be fixed by the law of supply and demand; and manufacturers were left free to manipulate the market as they pleased by combinations or otherwise. The active interference of the Council in industrial concerns had ceased after the Restoration; and therefore in times of trade depression employers could dismiss as many men as they pleased. By the same period the parts of the Elizabethan legislation which enabled a fair wage to be fixed by the justices were also forgotten; and when in 1813 Parliament was asked by the Lancashire weavers to revive them, it replied by repealing them.[2] As a natural consequence workmen have by gradual stages attained an equal liberty to obtain by combination or otherwise any wages they think proper. The law has in fact abandoned the greater part of its control, both over the relations between producers and the public, and over the relations between employers and workmen.

The Tudor statesmen, like the statesmen of the nineteenth century, were confronted with the task of adjusting old laws to the needs of changed commercial and industrial conditions. They faced the task, and at least succeeded in restoring a large measure of industrial peace. The statesmen of the nineteenth century contented themselves with repealing the old laws without putting anything in their place. In this way they succeeded in ousting the jurisdiction of the courts over a large range of questions closely bound up with the peace and well-being of the state, with the result that these questions, like the questions which arise in international law between sovereign states, can only be settled by reference to the fighting force of the contending parties. Our modern methods of strikes and lock-outs tempered by voluntary arbitration do not compare favourably with the firm control maintained by the state and the law in the sixteenth century.

I consider, therefore, that the legislation of this period on the subject of employer and workman was a well-thought-out scheme, logically connected with the legislation on the cognate subjects of the food supply and prices. It is, as we shall now see, as logically connected with the legislation on the cognate subjects of unemployment and pauperism.

(4) *Unemployment and Pauperism.*

"The poor we have always with us;" but in a comparatively primitive society the problem of the indigent and the impotent

[1] Above 379.
[2] Cunningham, op. cit. ii 635-638; 53 George III. c. 40.

is not very complex; and in the earlier mediæval period there were evolved a certain number of institutions and agencies for dealing with it, which were fairly adequate. But the complexity of the problem increases as the organization of society grows more elaborate; and, in the middle of the fourteenth century, the economic changes which led to the rise of the free labourer rendered these institutions and agencies wholly inadequate. The peace and security of the community were threatened by homeless able-bodied vagrants who supported themselves by preying on society, and refused to work for their living. The state therefore found it necessary to suppress these vagrants, and to distinguish between them and the impotent poor, who were unable to support themselves. The former must be dealt with by the criminal law: the latter were fit objects of charity. The economic social and industrial changes of the sixteenth century added further elements of complication. The problem of unemployment arose. It became necessary to distinguish between the idlers who refused to work, and the industrious who were willing to work, if work could be found for them. Clearly, if the health and strength of the nation were to be maintained and preserved, the state must endeavour to create an organization, which could not only reform and discipline the idler and help the impotent, but could also help the industrious to earn their living. The strength of a chain is measured by the strength of its weakest link. It gradually became clear that unless the problem of providing and working such an organization could be solved, the objects of the commercial and industrial legislation which I have just described would be very imperfectly attained. After many experiments the legislature evolved, in the last years of this and the first years of the following century, a code of law upon these matters, and a national machinery for the administration of that code, which have to a large extent survived to our own day. In that code are contained ideas and provisions drawn from all the periods through which the law on these subjects had passed. If, therefore, we would understand it, we must know something of the principles at the back of the earlier legislation, and of the social ideals at which that legislation aimed.

In the early mediæval period the problems of unemployment and pauperism were not matters with which the central government of the state concerned itself. Society was, as we have seen, split up into a number of self-sufficing units.[1] Each man was born to a definite status and a defined sphere of work; and consequently in a comparatively stationary society, there was

[1] Vol. ii 378, 379, 384, 391-394, 461.

little or no want of employment. The impotent or unfortunate were cared for (1) by the church, (2) by private charity, and (3) sometimes if they belonged to a gild, by the members of the gild.[1]

(1) Some part of the tithe should have been devoted to the poor; but in the thirteenth and fourteenth centuries the tithes had passed into the hands of monasteries, church dignitaries, and others, who did not regard themselves as bound to apply any part of them to this purpose.[2] On the other hand, the monasteries spent considerable sums in relieving the poor who applied to them. But it was ill-regulated and indiscriminate relief. They gave alms "not only to the people of the district, but also to all strangers who chose to apply, without having any power of control over them."[3] A better work was done by the hospitals and almshouses which were numerous throughout Western Europe. But in many cases these were in a decadent condition in the fifteenth century, and, in other cases, their income was mainly spent upon the officials who were supposed to administer them.[4]

(2) These hospitals were generally founded and largely supported by private charity. "For a long time almost every well-to-do citizen of London remembered the hospitals in his will."[5] We have seen, too, that the mediæval will is distinguished by the number and variety of charitable gifts made by it.[6] The day of the funeral, or the day on which the funeral was to be commemorated in successive years, was marked by a distribution of food and money.[7] The great nobility often distributed once or twice a day large quantities of food to all who applied. "I myself," says Stowe,[8] "in that declining time of charity, have oft seen at the Lord Cromwell's gate in London more than two hundred persons served twice every day with bread, meat, and drink sufficient; for he observed that ancient and charitable custom, as all prelates, noblemen, or men of honour and worship, his predecessors had done before him."

(3) The religious gilds, more especially in the towns, were

[1] For these agencies see Ashley, Economic History ii 306-332.

[2] Ibid 309, 310.

[3] Ibid 313, 314, citing Ratzinger, Armenpflege 397.

[4] Ibid 320-324; a Supplicacyon for the Beggars (E.E.T.S.) Extra Series xiii (written about 1529 by Simon Fish) 13, "To make many hospitals for the relief of the poore people? Nay truely. The moo the worse; for ever the fatte of the hole foundacion hangeth on the prestes berdes."

[5] Ashley, op. cit. ii 320; cf. Madox, Form. no. 780—a declaration in the nature of a will made by a citizen of London going on pilgrimage to Rome in 1475.

[6] Vol. iii 546.

[7] Ashley, op. cit. 330-331; cf. the tale told by Harman, A Caveat for Common Cursetors vulgarly called Vagabonds (1567) (E.E.T.S.) Extra Series ix 22, 23.

[8] Survey of London (Ed. by W. J. Thoms) 34.

accustomed to give some relief to their poor members; and, later, they sometimes maintained a hospital or an almshouse for this purpose.[1] In the course of the fifteenth century the craft gilds followed this example. "During the course of the fifteenth century," says Professor Ashley, "all the more important companies in London erected such establishments."[2] Then again some of the village gilds possessed lands which after the Reformation were used for charitable purposes—the church house or gild hall sometimes becoming the parish workhouse.[3]

Thus in the Middle Ages we get, as Professor Ashley puts it, "a miscellaneous congeries of benevolent agencies, with no sort of mutual co-operation, and no adequate supervision of the recipients of charity."[4] They no doubt did good work by the assistance which they gave to the impotent or unfortunate in the earlier mediæval period; and at a time when the problem of the able-bodied vagrant was by no means acute they were not capable of doing much serious harm. With the rise of a numerous class of able-bodied vagrants, this indiscriminate charity became positively dangerous; and obviously it was wholly unfitted to deal with the problem of unemployment as it appeared in the sixteenth century. At the same time this charity was, and continued to be, a valuable aid to the impotent. Such of these mediæval agencies as survived the Reformation were, as we shall see, utilized and co-ordinated with the national system created by the framers of the Elizabethan poor law, and provision was made to facilitate the creation of new foundations to further the various objects which this poor law was designed to effect.[5]

We have seen that the Statutes of Labourers bear witness to the fact that, in the middle of the fourteenth century, great social and industrial changes were taking place.[6] The refusal of the labourer to work at the old rates at once made the problem of the able-bodied vagrant acute, and therefore brought into prominence the evils of indiscriminate charity. The Statutes therefore provided, on the one hand, that labourers must work at the rates of wages fixed by law and must not wander about the country unemployed; and on the other, prohibited all giving of alms except to the impotent poor. The impotent poor were to remain where they were resident, or to be sent to the place of their birth.[7] Presumably the legislature expected that they would there get relief from existing charitable agencies, as it made no provision for raising funds for this relief, or for creating machinery to administer it.

[1] Ashley, op. cit. 324-326.
[2] Ibid 326.
[3] See instances by Professor Ashley, op. cit. 328 n. 76.
[4] Ibid 309.
[5] Below 393-394, 398-399.
[6] Vol. ii 459-460; above 379-380.
[7] 12 Richard II. cc. 3 and 7.

Up to the year 1535 the legislature adhered in substance to this scheme.[1] The able-bodied vagrant was to be punished, and sent to the hundred where he last dwelt or was best known. No one was to harbour such persons or give them alms. The impotent poor likewise must not move from their place of residence or birth, but they were not prohibited from begging. In 1530-1531, however, it was thought advisable to prohibit all begging except under licence of a justice of the peace.[2]

But it was gradually becoming apparent that this scheme was wholly insufficient to cope with the growth of pauperism and unemployment. It was futile to enact that all men must work when no work was found for them. It was equally futile to expect that the impotent would be relieved in the places where they resided, when there were no funds wherewith to relieve them. In fact many causes had combined both in England and abroad to make the problems of unemployment and pauperism far more complicated than they had ever been before.[3] In the first place the new capitalistic organization of trade produced fluctuations in the markets which threw many artisans out of work.[4] In the second place the increased supply of the precious metals, and the debasement of the coinage, which occurred at the latter part of Henry VIII. and throughout Edward VI.'s reigns, caused an enormous rise in prices.[5] In the third place the enclosures for pasture farming threw many out of work;[6] and even enclosure for arable farming often meant the eviction of tenants.[7] In the fourth place the great lords ceased to keep large bands of retainers, and let loose these idle ruffians on the country.[8] Lastly the dissolution of the monasteries cut off a source of relief; and though this relief had been indiscriminate and pauperising in its effects, its sudden cessation obviously added to the existing distress.[9] For all these reasons the state, both in England and abroad,[10] found itself obliged to adopt new measures. It is in these new

[1] See e.g. 11 Henry VII. c. 2; 19 Henry VII. c. 12: cf. 1 Edward VI. c. 3; 3, 4 Edward VI. c. 16; 14 Elizabeth c. 5.

[2] 22 Henry VIII. c. 12 § 1.

[3] On this vagabond class generally see Aydelotte, op. cit.; on the literature to which this class gave rise see ibid chap. vi.

[4] Above 320, 381.

[5] Leonard, Early History of Poor Relief 16.

[6] Above 364.

[7] Above 369.

[8] Leonard, op. cit. 14, 15; cf. 27 Henry VIII. c. 25 § 3 which mentions especially "rufflers calling themselves serving men;" cf. Aydelotte, op. cit. 14, 15.

[9] Ashley, op. cit. ii 316, 317.

[10] Professor Ashley has described, op. cit. ii 340-350, the parallel development of continental ideas and legislation; he shows that "the same causes were everywhere at work, leading to the same general results," and that "England, instead of preceding other nations, rather lagged behind, and its action was probably stimulated by continental examples," ibid 350; thus Vives, whose treatise De Subventione Pauperum (1525) had a large influence on continental legislation, was at the court

measures, adopted to deal with the new problems to which the new organization of commerce and industry had given rise, that we can trace the gradual evolution of the modern poor law.

A statute of 1535-1536[1] marks the beginning of this new legislative era. The preamble announces the important discovery that the former Acts were defective because no provision was made in them for providing work for the unemployed. This means that the legislature had realized that provision must be made not only for the able-bodied vagrant and the impotent poor, but also for the able-bodied man who was idle from no fault of his own. But this made the problem far more complicated, because it was clear that neither the machinery of the criminal law for repressing vagrancy, nor the existing charitable agencies for the relief of the impotent, could meet this need. But it was likewise clear that unless some machinery could be devised capable of dealing with it there would never be any real security against internal disorder. The peace and prosperity and power of the state were dependent upon its solution.[2]

From 1535-1536 we can trace the growth of six main principles which underlie the poor law of the sixteenth and early seventeenth centuries:—(1) the duty to contribute to the support and maintenance of the poor is a legally enforceable duty to the state. (2) The parish, acting under the supervision of the justices of the peace, is the basis for the assessment of these contributions and for their due administration. (3) The impotent poor must be relieved in and at the cost of the places at which they are settled. (4) The children of persons who cannot maintain themselves must be taught a trade and set to work. (5) The able-bodied vagrant and the beggar must be suppressed by the machinery of the criminal law. (6) The able-bodied must have work provided for them and be compelled to do it.

Of the growth of the first two of these principles I have already said something.[3] We have seen that the mediæval view that the duty to contribute for these purposes was a duty of a religious character lived long; and that the survival of this idea

of Henry VIII. between 1524 and 1527, ibid 344; as Miss Leonard has shown, op. cit. 277-292, it was not the legislation which was peculiar to England, but the consistent manner in which it was enforced; we shall see, below 400-401, that the machinery for enforcing it was very different to that which any other state possessed.

[1] 27 Henry VIII. c. 25. We may note that in an official account of the Reformation in England of 1539, L. and P. xiv i no. 402 p. 154, it was said that, "the states of this realm have by a law provided to avoid idle people and vagabonds, to cherish and sustain the poor impotent, and live so that the works of charity are observed better than ever."

[2] "During the first twenty years of Elizabeth's reign this army of idle, discontented vagrants, ready to join in any rebellion, kept the government in constant danger," Aydelotte, op. cit. 53.

[3] Above 155-157.

was one of the chief reasons why the legislature, from 1535-1536 onwards, chose the parish as the basis of its new system of poor relief and poor rates. The parish did not cease to be the basis of the system when, in 1563, this duty to contribute became a secular duty enforceable by the justices.[1] We have seen, too, that the legislature found that the machinery which it had created for levying rates and administering the poor law had transformed the parish into a unit of local government, which afforded a far better basis for the new administrative powers of the justices than the older communities. Thus the completion of the new system of local government, which lasted till the reforms of the last century, was, to a large extent, due to the need for devising an adequate machinery for administering a national poor law.

The third principle that the impotent poor must be relieved in and at the cost of the places at which they were settled is, as we have seen, as old as the Statutes of Labourers.[2] The statute of 1535-1536 directed the officers of the towns and the churchwardens of the parish to collect alms for this purpose;[3] and though the giving of alms, except for the purposes of the Act, was prohibited,[4] parishioners were allowed to relieve the necessities of fellow-parishioners.[5] This principle was also recognized by Acts of Edward VI., Mary, and Elizabeth's reigns.[6] But, till a compulsory rate was levied, it was obvious that the money collected might fall short of what was required; and therefore some of these statutes provide for the giving of licences to such persons to beg.[7] It was not till 1572[8] that provision was made for the relief of these persons in hospitals. In 1551-1552 the bishops had been directed to enquire into the manner in which these hospitals applied their funds;[9] and now further provision was made for their supervision, and for the supervision of other charitable foundations by the bishops and the justices.[10] The same Act provided for the registration of the impotent persons settled in each parish, for the removal of non-settled impotent poor, and for assessments to be made for their relief on the basis of these registers.[11] In this way such of the older charitable agencies as

[1] 5 Elizabeth c. 3.
[2] Above 390.
[3] 27 Henry VIII c. 25 § 4.
[4] § 13.
[5] § 21; cf. also §§ 26-28 for other exceptions.
[6] 1 Edward VI. c. 3 § 9; 3, 4 Edward VI. c. 16 § 4; 2, 3 Philip and Mary c. 5; 5 Elizabeth c. 3.
[7] 2, 3 Philip and Mary c. 5 § 7; 5 Elizabeth c. 3 § 10; 14 Elizabeth c. 5 § 40; for some account of these licences see Aydelotte, op. cit. 23-26; lepers and helpless poor were allowed to beg by proxy, and for this purpose proctors were employed, who were often "notorious rogues," ibid 24, 25.
[8] 14 Elizabeth c. 5 § 8.
[9] 5, 6 Edward VI. c. 2 § 6.
[10] 14 Elizabeth c. 5 §§ 32, 37.
[11] §§ 16, 17.

had survived were used in conjunction with the new parochial machinery to relieve those impotent persons who had a claim to be relieved by the districts in which they were settled.[1]

The fourth principle that the children of persons who cannot maintain themselves must be taught a trade and set to work appears in the statute of 1535-1536. Children between the ages of five and fifteen must be employed in husbandry or apprenticed to some other trade.[2] It was provided in 1549-1550 that the consent of the parents should not be necessary.[3] The master was given a remedy against persons who enticed away his apprentice, and the justices were given jurisdiction to discharge apprentices ill-treated by their masters.[4]

The fifth principle that the able-bodied vagrant and the criminal must be suppressed by the machinery of the criminal law also comes, as we have seen, from the Statutes of Labourers;[5] and it is maintained throughout the legislation of this period. The penalties of Richard II.'s statute were made less severe by two statutes of Henry VII.'s reign.[6] But the severity of the penalties was increased by the statute of 1530-1531;[7] and in 1547 it was enacted that all such vagrants who refused to work, or who ran away, could be adjudged slaves of their masters for two years. A second attempt to escape was punished with slavery for life, and a third with death.[8] This statute was repealed in 1549-1550, and Henry VIII.'s statute of 1530-1531 was revived.[9] In 1572 the penalties were again increased in severity. A third attempt to escape from service was punishable by death.[10] The same statute attempted to give a comprehensive list of those who should be deemed vagabonds, which is substantially the same as that given by the later Act of 1597.[11] But the increase in the severity of the penalties for vagrancy was wholly unable to stamp it out. The penalties provided by the Act of 1530-1531 were restored by an Act of 1593;[12] and it is clear from the researches of Harman,[13] an Elizabethan justice of the peace for the county of Kent, that none of these penalties were successful in ridding the

[1] Above 389-390.
[2] 27 Henry VIII. c. 25 § 6.
[3] 3, 4 Edward VI. c. 16 § 10.
[4] §§ 11, 12.
[5] Vol. ii 460.
[6] 11 Henry VII. c. 2; 19 Henry VII. c. 12.
[7] 22 Henry VIII. c. 12.
[8] 1 Edward VI. c. 3; Miss Leonard points out, op. cit. 56, 57, that this statute may not have appeared so monstrous in 1547 as it appears to us—"under the existing law an 'incorrigible rogue' was punishable with death, and this very punishment of servitude is suggested in More's *Utopia* as a much milder and better punishment than death for both petty thieves and vagrants;" however, its speedy repeal may show that it went too far even for the ideas as to punishment prevailing in 1547.
[9] 3, 4 Edward VI. c. 16.
[10] 14 Elizabeth c. 5.
[11] § 5; below 397 n. 6.
[12] 35 Elizabeth c. 7 §§ 6, 7.
[13] A Caveat or Warening for commen cursitor vulgarely called Vagabonds (1567) (E.E.T.S.) Extra Series ix.

country of the troops of disorderly persons which infested it. There were ranks among them. They had a sort of organization, and a peculiar patter of their own. In fact it was impossible to stamp them out till the machinery for providing work for the able-bodied, and compelling them to do it, had been perfected.[1]

The sixth principle that work should be provided for the able-bodied, and that they should be compelled to do it was, as I have said, first recognized by the statute of 1535-1536. It provided that the officers of towns and parishes should relieve the beggars settled there and set them to work. Parishes which neglected this duty were made liable to a fine of 40s. a month.[2] This injunction to provide work was repeated in statutes of 1547, 1549-1550, and 1572.[3] But no sort of instruction was given as to the manner in which this work should be provided. The result was that though the principle was admitted, it was not carried into effect. That it remained a dead letter is clear from the fact that it was enacted in 1572 that if the poor in the cities were too numerous they could be licensed to beg in certain districts.[4] . It gradually became clear that if the legislature wished to give practical effect to this principle it must provide some workable machinery for carrying it into effect.

In providing this machinery the legislature was assisted by the attempts which some of the larger towns had made to give effect to the principle.[5] London had obtained Bridewell, a disused royal residence; and by 1557 had established it as a hospital. There employment was provided for all applicants for relief, and thither the idle vagrant could be sent and compelled to work.[6] The inmates were paid for their work, and they paid a fixed charge for their food.[7] In 1571 a similar institution had been established at Norwich, together with a very complete organization for the relief of all kinds of paupers;[8] and in Ipswich, York, and Gloucester hospitals had been built or refounded for this purpose.[9] It was only by means of institutions of this kind that full effect could be given to the principle that work should be provided for the able-bodied; and it was not until such institutions became general that the other aims of the poor law could be effectively realized. As Miss Leonard says,[10] "the organization for the relief of the poor had been called

[1] Aydelotte, op. cit. 67.
[2] 27 Henry VIII. c. 25 § 1.
[3] 1 Edward VI. c. 3 §§ 9, 10; 3, 4 Edward VI. c. 16 §§ 4-6; 14 Elizabeth c. 5 §§ 16, 17, 22, 23.
[4] 14 Elizabeth c. 5 § 40; this licence was not confined, as in the earlier statutes, above 393 n. 7, to the impotent poor.
[5] On this subject see Leonard, op. cit. chap. iii; for earlier measures taken by Chester, Leicester, and London see Aydelotte, op. cit. 60-62.
[6] Leonard, op. cit. 30-36.
[7] Ibid 37.
[8] Ibid 101-107.
[9] Ibid 45.
[10] Ibid 39.

into existence because the crowds of vagrants were a chronic nuisance and danger to society. Bridewell dealt with the most difficult class of these vagrants and gave some of them a chance of training and reform. Moreover Bridewell as a place of punishment for idlers was the necessary counterpart of the new schemes for universal relief. It was impossible to relieve and find work for every one unless some means were provided for coercing and punishing the 'sturdy vagabond.' The institution of Bridewell was therefore the keystone of the whole system."[1] In 1575-1576[2] the legislature made this institution a part of the national scheme of poor relief. It was provided that one or two houses of correction should be erected in each county for the punishment and employment of rogues. Further, in towns and in the country, at certain places to be fixed by the justices, stores of materials were to be collected upon which the poor could be employed. Those who refused to work on these materials, or who spoiled them, were to be committed to the house of correction.

In the opinion of Coke it was upon the efficiency with which these houses of correction were maintained that the proper working of the poor law depended.[3] The severe corporal punishments of the earlier statutes had altogether failed in their object, and imprisonment, so far from reforming, actually corrupted. The house of correction, on the other hand, supplied a means whereby the rogue could be not only punished but reformed, and perhaps turned into a useful citizen. "Few or none," says Coke, "are committed to the common gaol but they come out worse than they went in. And few are committed to the house of correction but they come out better."[4]

Thus by the year 1575-1576 all the essential principles of the later poor law had been adopted by the legislature. But it is one thing to adopt principles, and quite another to carry them into effect and to secure their smooth working. From 1594 to 1597 there was a succession of bad harvests. The price of corn rose sometimes to four or five times the average price of the preceding years. This created an enormous amount of distress, and put too great a strain on machinery which was as yet very new.[5] Thus in the Parliament of 1597 the measures to

[1] Leonard, op. cit. 65. [2] 18 Elizabeth c. 3.

[3] Speaking of the early years of the seventeenth century, he says (Second Instit. 729), "upon the making of the statute 39 Elizabeth, and a good space after, whilst the justices of the peace and other officers were diligent and industrious, there was not a rogue to be seen in any part of England. But when the justices and other officers became *tepidi* or *trepidi* rogues etc., swarmed again;" Coke's opinion is borne out by Aydelotte, op. cit. 74, 75, as he says, "whippings and even worse punishments they had been able to evade or endure, but work was another matter: with the advent of this punishment in 1575 the poetry of their life began to decline, and the literature of rogues and vagabonds to fall back upon tradition."

[4] Coke, Second Instit. 754. [5] Leonard, op. cit. 73.

be taken for the relief of the poor occupied the first place, and a large number of bills were brought in to deal with various aspects of the question. Thirteen of these bills were referred to a large committee consisting of the most eminent members of the House. The committee sat in the Middle Temple Hall, and continued its meetings for the greater part of the session. The result of its deliberations was the Act for the relief of the poor, which is still the foundation of the poor law of to-day. But, besides this Act, many others were passed to deal with other aspects of poor relief. These Acts taken together form a great code in which is embodied the experience derived from the legislative and municipal experiments of the preceding years.[1]

The first of this series of Acts was for the relief of the poor.[2] The churchwardens and four overseers of each parish were to maintain and set to work children whose parents were unable to maintain them; to purchase stocks of material on which they were to set the poor to work; and to relieve the impotent. For these purposes they were to raise money by a rate; and power was given to the justices to rate a richer parish in aid of a poorer parish. Provision was made for the erection of cottages for the maintenance of the impotent poor. Parents were made liable to maintain their impotent children, and children their impotent parents—a liability extended in 1601 to grandparents and grandchildren.[3] The earlier Act of 1575-1576 had provided for the maintenance of bastard children by the father.[4] Begging was prohibited and all beggars were made punishable as rogues. The justices were empowered to levy a further rate for the maintenance of hospitals, almshouses, the relief of poor prisoners in the King's Bench and Marshalsea, and other charitable purposes. For this purpose no parish was to be rated at a larger sum than 6d. weekly or at a less sum than a ½d. weekly, and the total rate for all the parishes in the county was not to exceed 2d. weekly.

The second of these Acts was passed to punish rogues, vagabonds, and sturdy beggars.[5] It repealed all former Acts; and, following earlier precedents, gave a comprehensive list of persons who fell within these categories.[6] The justices were ordered to

[1] Leonard, op. cit. 73-80.

[2] 39, 40 Elizabeth c. 3, substantially re-enacted by 43 Elizabeth c. 2; for an account of the very slight differences between the two Acts see Leonard, op. cit. 133-135.

[3] 43 Elizabeth c. 2 § 6.

[4] 18 Elizabeth c. 3 § 1.

[5] 39, 40 Elizabeth c. 4.

[6] § 2; the following is a summary of this section: Persons calling themselves scholars going about begging; sailors pretending losses at sea going about begging; idle persons begging, using unlawful games or plays, or practising fortune telling or palmistry; proctors, procurors, or collectors for gaols, prisons, or hospitals; fences,

establish houses of correction; and all persons falling within the definition of rogue were to be whipped, sent to the place where they dwelt if they had any, or if not to the place where they had last dwelt "by the space of one year," or if that could not be discovered to the place of their birth.[1] There they were to be kept at work in the house of correction. Dangerous rogues were to be committed to gaol and banished to such places out of the realm as should be assigned by the Council. This Act was supplemented in 1609-1610 by further provisions requiring the justices under a penalty of £5 a head to erect houses of correction and providing for the management of these houses.[2]

The third of these Acts facilitated the foundation of hospitals,[3] and was supplemental to earlier Acts passed to facilitate the foundation of houses of correction.[4]

The fourth of these Acts was passed to reform deceits and breaches of trust touching land given to charitable uses.[5] The Lord Chancellor was empowered to issue a commission to the bishop of the diocese and others to enquire by a jury into the value and application of the revenues of charitable foundations. The orders of the commissioners were to be certified into Chancery, and the Chancellor was empowered to take any proceedings on them that seemed to him to be expedient. Persons aggrieved by the orders of the commissioners could appeal to the Chancellor. The Act was enlarged and re-enacted in 1601;[6] and this act of 1601 has had large effects upon the development of the law. The wide definition given, first by the court of Chancery and then by the common law courts, to the term "charity" was inspired, in the first instance, by the varied and comprehensive list of charities set out in the preamble to this statute;[7] the pro-

bearwards, players of interludes, or minstrels wandering and not belonging to or licensed by a baron or person of high degree; jugglers, tinkers, pedlars, and petty chapmen wandering about; wandering persons and common labourers who refuse to work at ordinary rates of wages, not being able otherwise to maintain themselves; prisoners delivered out of gaol who beg for their fees; wandering persons pretending losses by fire or otherwise; persons wandering pretending to be Egyptians (gypsies); for an amendment of this statute as to vagabonds of the wandering minstrel type see 1 James I. c. 7.

[1] § 3. [2] 7 James I. c. 4; Coke, Second Instit. 728-734.

[3] 39, 40 Elizabeth c. 5, supplemented by 21 James I. c. 1; Coke, op. cit. 720-727.

[4] 18 Elizabeth c. 3 § 9; 35 Elizabeth c. 7 § 9.

[5] 39, 40 Elizabeth c. 6; supplemented by 7 James I. c. 3—as to money given to bind children apprentices to trades.

[6] 43 Elizabeth c. 4.

[7] "It contained in the preamble a list of charities so varied and comprehensive that it became the practice of the court (of Chancery) to refer to it as a sort of index or chart," Commissioners for Special Purposes of Income Tax v. Pemsel [1891] A.C. at p. 581 *per* Lord Macnaghten; as this case decides, the list is not exhaustive, and gifts not coming within it, if clearly charitable, will be so regarded; it was not till the Charitable Uses Act 9 George II. c. 36 that the common law courts were concerned with the meaning to be attached to the term "charity;" they then adopted the equitable conception.

cedure provided by the Act enabled the Chancellor to intervene effectively to suppress breaches of trust; and the other provisions of the Act were so interpreted that he was able to give effect to many charitable gifts in spite of defects which would have been fatal to the validity of any other gift.[1]

As the earlier statutes show, the assumption by the state of the burden of providing for the poor and impotent had led it to interest itself in the administration of public charitable trusts;[2] and, as the legislation passed with the object of making this provision grew more elaborate and more extensive, the control of the state tightened. Thus it is ultimately to the evolution of the poor law that we must look, if not for the origins, at any rate for the modern development of the large control over public charitable trusts assumed by the court of Chancery, and of the still larger control entrusted by modern legislation to a body of Charity Commissioners.

Lastly another Act was passed in 1601,[3] in substitution for certain earlier Acts,[4] for the relief of soldiers and mariners by means of weekly pensions assigned by Quarter Sessions. The money was to be raised by a weekly rate assessed on the parishes.

This Elizabethan code for the relief of the poor was an essential part, and the logical consequence of the industrial and social policy of the state. Henry VII.'s Acts against vagrancy contained provisions against the playing of unlawful games by apprentices, and empowered the justices to punish the keepers of gaming houses,[5] while the series of Acts which make up this code of poor relief were preceded by two Acts which regulated tillage and enclosure.[6] This code was, as Miss Leonard says,[7] "part of a paternal system of government under which the rulers regarded the maintenance of the usual prosperity of every class as part of their duties." As we have seen, the state endeavoured in the interests of the preservation of order and the prosperity

[1] See generally Spence, Equity i 587-593; as Lord Macnaghten said in Pemsel's Case [1891] A.C. at pp. 580, 581, the statute did not originate equitable jurisdiction in cases of charity, see e.g. references to early cases cited by Spence 588 n. *f.*; but it encouraged charitable gifts, and provided a machinery for dealing with breaches of charitable trusts; thus it is after the statute that we get a large number of such cases; nearly all the cases cited by Tothill, Choice Cases 29-33, are cases on this statute.

[2] Above 393.

[3] 43 Elizabeth c. 3.

[4] 35 Elizabeth c. 4; 39, 40 Elizabeth cc. 17 and 21; c. 17 provided (§ 5) that the justices should find work for soldiers and mariners, and that they could levy a rate on the hundred for this purpose. It also provided severe penalties for those who wandered about the country pretending to be soldiers or sailors.

[5] 11 Henry VII. c. 2 § 5; 19 Henry VII. c. 12 § 7.

[6] 39, 40 Elizabeth cc. 1 and 2; above 366.

[7] Op. cit. 203; cf. ibid 140, 142; as Coke said, Second Instit. 728, "the education of youth and setting on work of idle and disorderly persons are essential parts of the well-being of a commonwealth."

of all classes to keep the price of food low, and to keep employment constant, to regulate the relations of employer and workman, and to settle the conditions under which all kinds of trade, domestic and foreign, could be carried on. If these measures did not avail to prevent distress, the machinery of the poor law must be invoked to relieve the impotent, to feed the starving, to provide work for the unemployed, and to coerce the vagrant. Thus just as the commercial and industrial policy pursued by the Tudors created new commercial and industrial conditions which necessitated the growth of new branches of commercial law, so it created new social conditions which necessitated a national scheme for the relief of the poor. And, because this scheme for the relief of the poor was the logical outcome of the economic policy of the state, the persons relieved through its agency did not have the peculiar status which they have acquired under the wholly different economic system of to-day.[1]

The fact that the system of poor relief was thus enforced as part of the general economic system of the state supplies us with one reason why it succeeded in establishing itself in England, and failed to establish itself in France and Scotland.[2] The poor law was only one among many methods employed by the Council to relieve distress.[3] All through the century it had been regulating with the greatest care the trade in corn and other provisions in times of scarcity and famine.[4] Thus, when an efficient machinery for national poor relief was established, it was able to use its accumulated experience to see that the law was carried out. As Miss Leonard has shown,[5] it was due to the active supervision of the Council in the sixteenth and earlier part of the seventeenth century that the law was made effective. This active supervision was at first chiefly displayed in times of scarcity; but from 1629-1640 the Council issued a book of Orders which it steadily, constantly, and successfully enforced.[6]

[1] Leonard, op. cit. 203, 204—there was little distinction between the relief that came from the poor rates and that which came from voluntary donations or charitable institutions.

[2] Ibid 277-292.

[3] See ibid chaps. x and xi for the various methods of relief employed in town and country; Miss Leonard enumerates the regulations as to the corn trade (above 374-375), provision of fuel in winter, help in time of sickness, help to sufferers from fire, apprenticeship, schooling, emigration, pressure on employers to employ, loans of capital.

[4] Above 374-375; Leonard, op. cit. 184-197 for the administration of the scarcity orders in 1623 and 1630-1631.

[5] Ibid 240, 241; cf. Aydelotte, op. cit. 57.

[6] Miss Leonard (op. cit. 254) after examining much evidence, concludes that, "the efforts made by the central government to enforce the law were at last successful, and that the period to which we owe the survival of our English system of poor relief is that of the personal government of Charles I.;" this is confirmed by many entries in the S.P. Dom. of the returns made by the justices as to what they had

But the success of the English Poor Law is not due only to the active supervision of the Council. It was due quite as much to the fact that the Council could command an efficient and an appropriate local machinery. Mere delegates of a central authority, who know little of local conditions, are not likely to be successful in administering a law which requires for its successful working a knowledge not only of local conditions, but also of the character of the persons who apply for relief. The justices of the peace were intimately acquainted with the economic conditions prevailing in their counties; and the parochial officials, upon whom fell the burden of giving relief, were generally acquainted with the personal merits and the history of those who applied to them for relief. All through the century their administration of the orders issued by the Council in times of scarcity had compelled them to become acquainted with the condition of the poor; and the reports of the judges of assize and of the justices made the supervision of the Council intelligent and effective. Both this supervision and the instructions of the judges, who knew from their experience on circuit what parts of the law caused most difficulty to the justices, helped both the justices and the parochial officials to administer it.[1] Thus the officials upon whom the duty of administering the poor law was imposed by the legislature were competent to perform it; and the pressure of the Council, which was both strong and intelligent, accustomed them to perform it regularly. "Privy Council and justices were alike effective at the same time; the Privy Council took action, and the justices were urged to do their duty. Few officials, perhaps none, could have done the work so well. If the justices of later days granted too much relief, it was because of the justices of Charles I. that relief was ever efficiently administered at all."[2]

The success of the poor law has had important effects upon the social and political history of the succeeding centuries. It has brought the needs of the poor to the notice of the rich in their capacity of ratepayers; and it has compelled those of the richer classes upon whom the burden of administering

done to relieve distress or enforce the poor law, see e.g. S.P. Dom. (1631-1633) pp. 6, 7, 8, 9, 26, 28, 32, 37, 48, 50, 66, 79, 160, 585; ibid (1633-1634) 37, 130, 240, 321; Aydelotte, op. cit. 72-75; the letter of Edward Hext, a Somersetshire Justice of the Peace, to the Privy Council in 1596, printed ibid App. A. 14, shows the difficulty of the task accomplished by the Council.

[1] See Lambard, Duties of Constables etc. (ed. 1619) 49-52 for twenty resolutions of the judges as to the manner in which some problems connected with the law of settlement, removal of paupers, and rating should be decided; see above 75-76 for a general account of the manner in which the judges of assize formed a connecting link between central and local government.

[2] Leonard, op. cit. 292.

the poor law has been cast, to acquire a very intimate knowledge of the conditions under which the poor live.[1] It has been no small factor in making modern England a peaceable and law-abiding country.[2] Its more immediate effect was to supply exactly the institution which was needed to ensure the success of the commercial and industrial legislation which I have just described. We shall now see that the success of this legislation has had large and permanent effects upon the ordering of all classes of English society.

(5) *Classes of Society.*

We have seen that in the Middle Ages the lines between the different classes of society were well defined. The various orders of the peerage and the knights, the esquires and gentlemen, the clergy, the lawyers, the merchants, the yeomen, the artisans, and the villeins, all held a very definite status of their own.[3] In many cases these different classes were subject not only to special rules of law, but also to the jurisdiction of special courts; and these very marked differences in legal position gave practical point and effect to the generally accepted belief that these differences between the various classes of society were necessary to its existence, and ordained, if not by the law of God, at any rate by the law of nature.[4] This sharpness of definition gave to all the class distinctions of the Middle Ages a certain element of caste; and, in some cases, the extent of these differences gave to certain of these classes—e.g. the clergy, the villeins, and perhaps the free labourers—almost a status of their own.

The growing supremacy of the state and its laws over all persons and causes blurred somewhat the sharpness of these class distinctions. As the mercantile law and the ecclesiastical law came to be administered by courts which derived their authority from the state;[5] as villein status decayed;[6] and as the holding of the villein got the protection of the central courts[7]—the peculiarities in the legal status of the members of these different classes gradually became less marked. The commercial and industrial changes tended in the same direction. Commerce and industry were no longer organized and con-

[1] Leonard, op. cit. 302, 303.

[2] Ibid 303, 304—Miss Leonard tells us that, "Louise Michelle on her visit to England was more struck by English poor relief than by any other English institution: she said that a like system in France would have prevented the French revloution."

[3] Vol. ii 464-466.

[4] Cf. Ashley, Economic Hist. ii 389, 390.

[5] Vol. i 568-573, 588-598.

[6] Vol. iii 500-508.

[7] Ibid 208-211.

ducted on traditional lines. More scope was allowed to individual activity and initiative. Men struck out new lines for themselves; and the state endeavoured to regulate these new activities in such a way that they conduced to the well-being of its subjects and consolidated its own power.[1] Great merchants, like Gresham, could sometimes do greater service to the state than the great landowners;[2] and, in some of the rules adopted by the governing bodies of the large towns, the legislature found models which they were glad to adopt as the basis of some of their statutes.[3] Merchants became landowners,[4] and, from this century onwards, the younger sons of the landed gentry turned to trade.[5] At the same time we get the rise of the different learned professions. We have seen that the profession of the law had been organized from an early period. Already in the days of Chaucer, lawyers were great purchasers of land.[6] The clergy occupied a less isolated position, now that the church had been made subject to the state. It was in this period that the profession of medicine began to get a definite organization.[7] Thus we get the rise of a great middle class closely connected in its highest ranks with the peerage, and in its lowest with the yeomen and smaller traders. It embraced the landowning, the commercial, and the professional classes; and its members were governed for the most part by the same rules of law, and subject to the jurisdiction of the same courts. Nor was it unusual for the members of this great class to pass from the grade in which they were born to other grades. Sir Thomas Smith tells us[8] that many yeomen, "after setting their sonnes to the schoole at the Universities, to the lawe of the Realme, or otherwise leaving them sufficient landes whereon they may

[1] Above 324-325. [2] See above 333.

[3] E.g. with regard to apprenticeship and the poor law, above 341, 395.

[4] Above 371-372.

[5] See Gibbon Autobiographies, Memoir F. p. 3, "In the beginning of the seventeenth century a younger branch of the Gibbons of Rolvenden migrated from the country to the city, and from this branch I do not blush to descend. The law requires some abilities; the church imposes some restraints, and before our army and navy, our Civil establishments and Indian Empire, had opened so many paths of fortune, the mercantile profession was more frequently chosen by youths of a liberal race and education who aspired to create their own independence. Our most respectable families have not disdained the counting house or even the shop; their names are enrolled in the livery and companies of London; and in England, as well as in the Italian commonwealths, heralds have been compelled to declare that Gentility is not degraded by the exercise of trade."

[6] Vol. ii 490.

[7] Henry VIII. had incorporated the physicians of London in 1518; the powers of this corporation to examine and license physicians were enlarged by statute in 1523 (14, 15 Henry VIII. c. 5), and further powers were conferred in 1553 (1 Mary st. 2 c. 9); the famous Dr. Bonham's Case (1610) 8 Co. Rep. 113b, turned on the legality of certain acts done by the College of Physicians under these statutes.

[8] Republic Bk. i c. 23.

live without labour, doe make their saide sonnes by those means gentlemen." Thus although, as he says, the king alone could create knights, barons, or higher degrees, gentlemen "be made good cheape in England."[1]

Below this large middle class stood the agricultural labourers, the copyholders, the small shopkeepers, and the artisans.[2] Their position, as defined by the labour and apprenticeship code of Elizabeth,[3] retained more of the characteristics of a status than the position occupied by the higher classes; and this was a necessary consequence of the commercial and industrial policy of the Tudors. The fixed rules of law as to rates of wages, and the other measures taken by the government to provide employment and cheap food, were necessary for the protection of the economically weak. The prohibition of a combination to raise wages, and the separate remedies provided to compel workmen to keep their contracts, were necessary in order to secure the peace of the state and the rights of the employer. As we have seen,[4] those who obtained relief through the poor law did not occupy, as they occupy in modern times, a peculiar status of their own. The gift of such relief was an essential part of the industrial policy of the period. The law prohibited vagrancy and begging, and compelled able-bodied men and women to work. If work could be found in no other way the state undertook to provide it. Similarly the state recognized a duty to provide for the impotent and the unfortunate, and to mitigate as far as possible a time of scarcity or famine. But of this industrial code of the Tudor period the part dealing with the poor law has alone survived. When the state ceased to regulate the bargains made between employer and workman, the conditions of apprenticeship, the proportion of the labouring population employed upon manufacturing industries, and the prices of food, the pauper relieved by the state naturally came to occupy, under these new commercial and industrial conditions, an altogether unique status of his own. Historically that status is the product, not of the Elizabethan legislation which created the poor law, but of the repeal of the

[1] Republic Bk. i c. 20, "But ordinarily the king doth only make knights and create barons or higher degrees: for as for gentlemen, they be made good cheape in England. For whosoever studieth the lawes of the realme, who studieth in the universities, who professeth liberall sciences, and to be shorte, who can live idly and without manuall labour, and will beare the port, charge and countenaunce of a gentlemen, he shall be called master, for that is the title which men give to esquires and other gentlemen, and shall be taken for a gentleman."

[2] Ibid Bk. i c. 24, "The fourth sorte or classe amongest us, is of those which the olde Romans *capite censii proletarii* or *operæ*, day labourers, poore husbandmen, yea merchantes or retailers which have no free lande. copiholders, and all artificers, as Taylers, Shoomakers, Carpenters, Brickemakers, Bricklayers, Masons, etc."

[3] Above 341-342, 380-383. [4] Above 400.

Elizabethan legislation and the reversal of the Elizabethan policy as to commerce and industry.

It was no doubt difficult for the labouring class to rise in the social scale—more difficult than for the members of the wide and miscellaneous middle class. But it was not impossible. Moreover all these classes were not only protected by the law, they also took some share in its administration. From the nobleman who filled the post of Lord-Lieutenant of the county, to the country labourer who acted as constable or aleconner or juryman, all were called upon for gratuitous service.[1] In a society so organized the remnants of villein status which yet survived to remind men of the older order, naturally appeared strange anachronisms for which writers would apologize, and against which the law would lean more strongly than ever it had leant before.[2]

This new grouping of society was thus to a large extent the outcome of the economic changes of the century. We have seen that these economic changes produced much hardship and much disorder in the earlier part of the century. Therefore we are not surprised to find that writers of this period invested with a romantic halo the old days when society was arranged in fixed orders, each doing its duty in that state of life to which it had been called.[3] Nor did the public opinion of the day wish to break entirely with these ideas. This comes out clearly in the idea that the members of one trade should not encroach upon the province of the members of another.[4] It was still more sharply emphasized by the statutes which, throughout the sixteenth century, attempted to regulate the apparel which each class might wear, partly in order to emphasize class distinctions, and partly to moderate extravagant

[1] See Smith, Republic Bk. i c. 24.

[2] Vol. iii 507-508.

[3] Starkey, England in Henry VIII.'s time (E.E.T.S.) 157, 158, "But now, to kepe thys body knyte togydur in unyte, prouysyon wold be made by commyn law and authoryte, that euery parte may exercyse hys office and duty—that ys to say, euery man in hys craft and faculty to meddyl wyth such thyng as perteynyth thereto, and intermeddyl not wyth other; for thys causyth much malyce, envy, and debate;" cf. Crowley's works (E.E.T.S.) passim, and especially, "the Voyce of the Laste Trumpet," which contains twelve lessons to twelve several estates of men; the prefatory lines (p. 57) run:—

> "Fyrste walke in thy vocation,
> And do not seke thy lotte to chaunge;
> For through wycked ambition,
> Many men's fortune hath been strayynge;"

cf. also "The Way to Wealth," at p. 147, "Wishe that you had contented yourselves with that state wherein your fathers left you, and strive not to set your children above the same, lest God take vengaunce on you both sodenly when ye be most hastie to clime."

[4] For illustrations see Acts of the Privy Council (1613-1614) 37—separation of functions between merchants and drapers in the cloth trade; ibid 62-64, 161-162, 236-237, 372-373—the bricklayers and the plasterers; 562-564—the curriers and the shoemakers.

expenditure.[1] These statutes were enforced by many proclamations;[2] and the proclamations attempted also to regulate the expenditure of the different classes on food as well as on apparel.[3] But both the sharpness with which this idea was emphasized by these statutes, and the means taken to enforce it became obsolete as the century advanced; and the statutes were all repealed in 1603.[4]

As it was with the institutions and law of the state, so it was with the grouping of classes within the state—mediæval and modern ideas had met and blended. And the preservation of some of the mediæval feeling in favour of a due subordination of class to class, and of a separation between different classes which had different duties to perform,[5] has had happy results upon English society and the English state. A strict caste system is favourable to corruption and fatal to progress; but a system which persists in ignoring all differences between classes, and in attempting to realize the fantastic doctrine of the equality of all individuals of the state, is favourable to social discontent and consequent unrest, and fatal to individual effort. Individuals are not all equal; and there must be different classes in a civilized state. The Elizabethan legislation recognized these obvious facts; it aimed, as we have seen, at securing a fair treatment for all the classes of which the nation was composed; and at so organizing the various forms of commercial, industrial, and professional activity that a high standard of workmanship and conduct should be impressed upon all classes of workers in their several spheres. Shakespeare well expressed the ideals of the Tudor statesman in his well-known lines:[6]

> O, when degree is shaked,
> Which is the ladder to all high designs,
> The enterprise is sick! How could communities,
> Degrees in schools and brotherhoods in cities,
> Peaceful commerce from dividable shores,
> The primogenitive and due of birth,
> Prerogative of age, crowns, sceptres, laurels,
> But by degree, stand in authentic place?
> Take but degree away, untune that string,
> And hark what discord follows!

[1] 1 Henry VIII. c. 14; 6 Henry VIII. c. 1; 7 Henry VIII. c. 6; 24 Henry VIII. c. 13; 1, 2 Mary c. 2; the contents of these statutes give us a clear idea of the chief classes into which society was divided at this period; and the preambles, of the objects with which they were passed.

[2] Above 304.

[3] Ibid; cf. 5 Elizabeth c. 6—vendors of foreign apparel must sell for ready money except to purchasers who have an income of £3000 a year or over.

[4] 1 James I. c. 25 § 7.

[5] Thus Smith, Republic Bk. i c. 22, speaking of the citizens and burgesses, says, "these be to serve the commonwealth in their cities and burrowes, or in corporate townes where they dwell. Generally in the shyres they be of none accompt, save onely in the common assembly of the realme to make lawes, which is called the Parliament."

[6] Troilus and Cressida Act I. Sc. 3.

At the same time the state control and the trade and professional organizations were not so rigid that impassable class barriers were created. The maintenance of class barriers between the nobility, the knights, the gentlemen, the yeomen, and the labourer in husbandry; between the great merchant, the shopkeeper, and the journeymen, helped to preserve in each class a standard of conduct appropriate to that class, and helped to make a system of self-government possible by maintaining a due subordination of the various orders in the state. But it was never impossible for an active man to rise out of his class.[1] It was never impossible for talented members of an active family to rise in a few generations to the highest positions in the state.[2] Thus, by the end of the century, the rigidity of the mediæval class system has given place to the definite yet flexible class distinctions of modern English society.

Uses and Trusts

The commercial, industrial, and social changes which left so deep a mark upon the Statute Book necessarily led to corresponding changes in the law of property and contract. But, for the most part, these changes were not effected by the legislature. If we except the statutes dealing with the use and with the closely connected subject of the will of real property, the additions to and changes in the law of property movable or immovable, made by the legislature are neither numerous nor of first-rate importance;[3] and the legislature played no part at all in the development of the law of contract. We must look for an explanation of this absence of legislation on these topics to the fact that, in the sphere of property, the use and the trust were so developed by the courts of law and equity that they fully met the needs of the owners of property for larger powers of disposition, and more convenient methods of exercising those powers; and that, in the sphere of contract, the development of the action of assumpsit[4] created an entirely adequate conception of contract based upon the idea of consideration.[5]

Both the trust and the doctrine of consideration are peculiar to English law, and to the law of those countries which have come under its influence. Both have their roots in the law of the Middle Ages, and both assumed their modern shape and their

[1] As we have seen, vol. iii 505-506, it was this fact which sometimes made the survival of the law as to villein status valuable to the lords.

[2] We may recall, in this connection the traditions that Empson was the son of a sieve maker, Thomas Cromwell of a blacksmith, and Wolsey of a butcher.

[3] See below 480-488 for some account of these changes.

[4] Vol. iii 429-453.

[5] For the history of this doctrine see Pt. II. c. 3 § 1.

modern importance in the sixteenth century. The extent and the nature of their influence upon English law at different periods in its history have been very different; but they have not been wholly dissimilar; for both have had very large effects upon the development not only of our private but also of our public law. There was a period in our legal history when the law of contract was appealed to to explain the origin of society;[1] and there was yet a later period when complete freedom of contract was supposed to be the cure for all the social ills of the body politic.[2] Trusts likewise have, from the sixteenth century onwards, played a part in the development of our public law, larger and more direct than that played by contract. They have peopled our state with groups and associations which have enabled the individual persons who have created or who compose them to accomplish much more than any single individual composing them could have accomplished. Students of these entities, if they have not attempted to deify them, have at least worked hard to personify them.[3] And, whatever may be the nature of their personality, it is, as we shall see, quite clear that they have exercised a large influence over our commercial, religious, political, and social life.[4] The modern political theorist, having awakened to these facts of legal history, has almost dropped the use of concepts derived from the law of contract, and has adopted another and a more elastic set of concepts derived from the law of Trusts. He has found that in these days of complex constitutions and federated empires, of democratic rule and social reconstruction, the elasticity of the trust concept yields a more apt and a more fruitful crop of political metaphors.[5]

I have already said something of the growth of our modern law of contract during this century, and I shall relate its later history in a subsequent chapter of this Book.[6] Here I must deal with the development of uses and trusts, and attempt to describe the manner in which and the extent to which they have come to influence all branches of English law. With the growth of the technical rules by means of which this influence was attained I shall deal later.

[1] Above 216; vol. vi c. 6.

[2] Above 379, 386-387 for some of the results of this view in the economic sphere; cp. Maitland, Gierke's Political Theories of the Middle Age xlii, xliii.

[3] Geldart, The Nature of Legal Personality L.Q.R. xxvii 90; vol. iii 482-487; Pt. ii c. 6 § 2.

[4] Below 476-480.

[5] Maitland, Gierke xxviii-xxxviii; Trust and Corporation, in Collected Papers iii 366-403—as Maitland says, at p. 402, the Trust "is an elastic form of thought into which all manner of materials can be brought;" below 477-479 for some illustrations of the influence of the trust concept in public law.

[6] Vol. iii c. 3; Pt. II. c. 3.

The effects of the rise of a new proprietary right can never be confined entirely to private law. Already in the Middle Ages the growing popularity of the use had begun to produce effects which concerned the well-being of the state; and the state had begun, sometimes to prohibit, and sometimes to regulate certain of the purposes to which it was being put.[1] In 1535-1536 the famous Statute of Uses put the law as to certain of these uses and trusts upon a new basis.[2] It introduced one important variety of uses relating to interests in land into the common law, without stopping the free development of equitable rules relating to other varieties. It gave, therefore, a much-needed elasticity to the common law rules relating to all kinds of interests in land; and it did not prevent the Chancellor from applying freely his conception of the use to many other branches of the law. It determined the position which the commonest variety of the mediæval use should occupy in the law of the sixteenth century, and, for this reason, it forms the starting point of our modern law of uses and trusts. It is because this statute has had these large effects direct and indirect upon the growth both of the common law and of equity that it is perhaps the most important addition that the legislature has ever made to our private law.

In order to understand the provisions of the Statute from which our modern law on this subject originates, I must, in the first place, say something of the origins of the use, of the reasons for its growth, of its mediæval development in the Chancery, and of the extent to which it had already been controlled by the legislature. In the second place, I must deal with the Statute of Uses. In the third place, I must briefly indicate the permanent effects of the Statute of Uses. This will involve a short account, firstly, of the influence which, as a result of that Statute, the uses affected by it have exercised upon common law; and, secondly, of the influence which the trusts, which were not affected by it, have exercised upon many branches of our private and public law. My arrangement of the subject will therefore be as follows:—(1) The Use in the Middle Ages; (2) The Statute of Uses; (3) The Use at common law and the Equitable Trust.

(1) The Use in the Middle Ages.

I have already shortly summarized the mediæval history of the use when dealing with the history of jurisdiction of the Chancery.[3] Here I must deal with this subject in detail under the following heads:—(i) The origin of the use, and the reasons for the position taken by it in English law; (ii) its development by the Chancery; and (iii) its control by the legislature.

[1] Below 443-449. [2] 27 Henry VIII. c. 10. [3] Vol. i 454-455.

(i) *The origin of the use, and the reasons for the position taken by it in English law.*

Early writers on the use had no hesitation in looking to Roman law for its origin. Gilbert, Sanders, Blackstone, Spence, and Digby all point out the analogy which exists between the position created by the grant of a *usus* or a *ususfructus* or the bequest of a *fideicommissum*, and that created by the feoffment to one person to the use of another.[1] But the existence of analogy is one thing: the proof that the later in date of the two analogous things is derived from the earlier is quite another. Practically every one is now agreed that these institutions of Roman law are merely analogies of a superficial kind; and that, though some of them may have had some slight influence on the development of the use in the thirteenth and fourteenth centuries,[2] we must look to quite a different quarter for its origin.

Mr. Justice Holmes was the first to point out that the root idea underlying the conception of the use is to be found among the Germanic tribes.[3] That root idea consists in the recognition of the duty of a person to whom property has been conveyed for certain purposes to carry out those purposes.[4] The fact that one man trusts another in this way naturally appears in any sort of society which has progressed so far as to possess even the most rudimentary system of law.[5] A very small amount of legal development will necessitate some sort of institution by which effect can be given to the desire to create trusts of this kind. That institution early Germanic law found in the Salman or

[1] Gilbert, Uses (ed. 1811) 3 talks of the usufruct, and Sanders, Uses 1-8, of the fideicommissum; Bl. Comm. ii 327, 328 says, "that they answer more to the fideicommissum than the usufructus of the civil law," and that they were "transplanted into England from the civil law about the close of the reign of Edward III. by means of the foreign ecclesiastics, who introduced them to evade the statutes of mortmain;" Spence, Equitable Jurisdiction i 436 says it is quite clear that they are derived from the fideicommissum; Digby, History of the Law of Real Property (4th Ed.) 314-316, mentions all these analogies, and adds that between Dominium ex jure Quiritium and Bonitarian ownership, without committing himself to the view that in any of them can be found the origin of the use; Bacon, Reading on the Statute of Uses (Works, Ed. Spedding vii 407, 408) rightly treats these Roman law analogies merely as analogies, and further cites the interesting analogy between the interest of the c.q. use and that of the copyholder drawn by Periam C.B. in Chudleigh's Case, ibid at p. 408; see S.C. *sub nom.* Dillon v. Fraine (1589-1595) Popham Rep. at p. 75.

[2] Below 416 417.

[3] L.Q.R. i 162; Essays in A.A.L.H. ii 705-716.

[4] L.Q.R. i 163-164.

[5] As Bacon says, Reading on the Statute of Uses 415, "an use is no more but a general trust, when a man will trust the conscience of another better than his own estate and possession; which is an accident or event of human society which hath been and will be in all laws;" and this, as he there points out, is the meaning of the saying of Fitzherbert and other judges, that uses were at common law because common law is common reason, and common reason bids men trust one another, Y.BB. 14 Hy. VIII. Mich. pl. 5; 27 Hy. VIII. Pasch. pl. 22 cited vol. ii 594 n. 5, 595 nn. 1 and 2.

Treuhand.[1] He was, as we have seen,[2] a person to whom property had been transferred for certain purposes, to be carried out either in the lifetime or after the death of the person conveying it. The recognition, if not by the law at least by public opinion, of the binding character of his obligation, involved the recognition of the broad principle that such a duty ought to be enforced.[3] It was the breadth of the principle thus recognized that has made the institution by which effect was given to it the ancestor of many important institutions and principles of our modern law. It was the Salman who was the ancestor of the executor; and it was the existence of an executor[4]—a person upon whom a testator could lay many various duties—that enabled persons by their wills to give effect to their wishes as to the manner in which their property should be employed after their death.[5] It is to this institution that we must look for the beginnings of the law as to bailment and agency.[6] And it is to the same quarter that we must look for the origin of the earliest conveyances to uses.[7] The feoffee to uses, like the Salman, held on account of another—the cestuique use;[8] and it was because the feoffor could

[1] The word seems to come from "Sala" meaning transfer—he is a person through whom effect is given to a transfer, and German authorities apply the name to all intermediaries through whom a transfer is effected, Caillmer, L'Execution Testamentaire 124 n. 2; we do not meet the word itself with any frequency till the twelfth century, ibid, and cp. Goffin, The Testamentary Executor 24; such an intermediary clearly appears in the Salic law c. 46 *De hac famirem* in connection with conveyance.

[2] Vol. iii 563-564.

[3] Schultz, Die Langobardische Treuhand, does not think that the Salman was under a strict legal obligation; but Caillmer, op. cit. 561-564 thinks that, at any rate in some places, he was under such an obligation—"Ces divers documents nous montrent que les coutumes de l'époque franque et du moyen age ne repugnaient pas absolument à l'admission d'une action contre l'exécuteur au profit du destinataire. Il est cependant impossible d'affirmer que partout les coutumes l'ont reconnue;" as Goffin says, op. cit. 26, 27, "The strict observance of his instructions was secured by the obligation of the Salman to respect the trust (Verthrauen, *fiducia*) placed in him. The property was put under his *manus fidelis*, 'getreue Hand,' and the duties thereby imposed could not be lightly disregarded, though it is not certain whether formal dishonour followed their breach."

[4] Vol. iii 564. [5] Ibid 547-548. [6] P. and M. ii 226, 227.

[7] Holmes, L.Q.R. i 163-164 says, "The feoffee to uses of the early English law, corresponds point by point to the Salman of the early German law, as described by Beseler fifty years ago. The Salman, like the feoffee, was a person to whom land was transferred in order that he might make a conveyance according to his grantor's directions. Most frequently the conveyance was to be made after the grantor's death, the grantor reserving the use of the land to himself during his life. To meet the chance of the Salman's death before the time for conveyance was over, it was common to employ more than one, and persons of importance were selected for the office. The essence of the relation was the fiducia or trust reposed in the *fidelis manus*;" for a comparison between the Lombard Salman and the feoffee to uses see Maitland, Corporation and Trust, Collected Papers iii 327-332, 345, 346; for a good account of the Salman in relation to the will see Goffin, op. cit. 24-33.

[8] The word "use" as used by English lawyers comes from the Latin *opus* through the old French *os* or *oes*; the phrase "cestuique use" is apparently a shortened form of "cestui a qui oes le feffement fut fait:" later the phrase "cestuique trust" appears, Maitland, Collected Papers iii 343 n.

impose on him many various duties that landowners acquired through his instrumentality the power to do many things with their land, from which they had been debarred by the rigid rules of the mediæval common law.[1]

Germanic law, therefore, was familiar with the idea that a man who holds property on account of or to the use of another is bound to fulfil his trust. We find many illustrations of the purposes to which this idea was put both at home and abroad from the earliest period.[2] Frankish formulas from the Merovingian period speak of property given to a church "ad opus sancti illius."[3] Mercian landbooks of the ninth century convey land "ad opus monachorum."[4] Domesday book speaks of geld, or money, or sac and soc, held "ad opus regis" or "reginæ" or "vicecomitis."[5] The laws of William I. speak of the sheriff holding money "al os le rei."[6] But till the law begins to develop into a regular system the place which this idea will take in that system cannot be fixed. We have seen that this development came with the legal Renaissance of the twelfth and thirteenth centuries.[7] As a result of that Renaissance we get the beginnings of the common law; and with the beginnings of the common law we can see the position which this idea of holding property on account of or to the use of another will take in it.

We have seen that the most fundamental dividing line of the mediæval common law was the division between chattels which were protected and recoverable by personal actions, and hereditaments which were protected and recoverable by the real actions.[8] In these two different branches of the law this idea has had a very different history.

Chattels could be left by will, and therefore, as we have seen, the continental Salman soon developed into an executor.[9] Then again, from an early period, the personal character of the action of detinue, by which a person entitled to chattels could recover either them or their value from a bailee or a finder, emphasized the personal character of the obligation to restore which rested upon the man who had been entrusted with, or who had come into the possession of, what was not his own.[10] The development

[1] Below 417, 436-437, 438-443.

[2] See the instances collected P. and M. ii 231, 232.

[3] Cited P. and M. ii 231 from Formulæ Merovingici et Karolini Ævi (Monumenta Germaniæ) 208.

[4] Cited ibid from Kemble Cod. Dipl. v 66.

[5] Cited ibid from D.B. i 60b, 209.

[6] Cited ibid from Leges Wilhelmis i 2 § 3.

[7] Vol. ii 145-149, 174-207. [8] Vol. iii 26-29. [9] Ibid 564.

[10] This personal character of the action of Detinue only gradually emerged vol. ii 366-368; but it was clearly personal in character long before the sixteenth century, Core's Case (1536) Dyer at p. 22b; see vol. iii 324-328, 348-351 for its mediæval development.

of the personal actions which protected possession and ownership strengthened this idea. The extensions of detinue, and the rise of trover, enabled not only a bailor and a dispossessed owner,[1] but also a third person, to whose use goods had been bailed,[2] to get full recognition of their interests. And, as we have seen, the interest of one to whose use money had been paid was protected by the action of account.[3] In fact, if this action and the ideas implicit in it had been developed, the common law might (in this as in other cases) have acquired certain principles, both of substantive and adjective law, which came in later days to be peculiarly the property of equity.[4] Thus, partly by reason of the recognition of the right to bequeath chattels by will, but chiefly by reason of their destructible and movable character, which made it necessary that rights to chattels should be protected by personal actions based upon an obligation to restore, the common law had, from very early days, recognized the interest of the person on whose account another held property, and enabled him to enforce his rights against the holder. That this was in effect the enforcement of a trust was recognized by Blackstone. "There are other trusts," he said, "which are cognizable in a court of law: as deposits and all manner of bailments; and especially that implied contract . . . of having undertaken to account for money received to another's use.[5]

That the recognition of the interest of the man to whose use chattels were conveyed, was chiefly due to the character of the remedies by which the owner of such chattels was protected, is made the more probable by the fact that the common law did not recognize such an interest, if the owner of chattels real transferred their possession to another, to his own or any body else's use.[6] We have seen that the development of the remedies for the protection of the owner of a chattel real followed a course very different from that which it followed in the case of the remedies which protected the owner of a chattel personal.[7] The termor gradually obtained a protection which, though it differed

[1] Vol. iii 324-328, 348-351.

[2] Ibid 355 n. 6; Ames, Origin of Uses, Essays in A.A.L.H. ii 743 nn. 3 and 4.

[3] Vol. iii 426-428; Ames, op. cit. 743 n. 5; the interests of persons thus protected, and that of the c.q. use of lands or chattels protected by the Chancellor, had, owing to the difference in their development, come to be quite distinct by 1540, see the remarks of Baldwin J. in Lyte et Uxor v. Peny, Dyer 49b; and for a clear statement of the distinction see Hening, Beneficiary's Action in Assumpsit, Essays, A.A.L.H. iii 360-362.

[4] Vol. ii 246-249, 343-347; vol. v 297-299, 315-316.

[5] Comm. iii 432.

[6] Gray, Perpetuities (ed. 1906) § 832; it is true that a bailiff who occupied land as the agent of another was liable to account to that other, vol. iii 426-428; below 421; but against a person who had possession of land either as tenant, Y.BB. 49 Ed. III. Hil. pl. 11; 10 Hy. VI. Mich. pl. 67; or as a trespasser Y.B. 32 Hy. VI. Hil. pl. 60—the writ of account did not lie.

[7] Vol. iii 214-217.

in form, was similar in kind to that afforded to the freeholder; and his interest gradually acquired many of the characteristics of the freeholder's interest,[1] not the least important of which was the absence of any legal recognition of the interest of the man to whose use another held. We shall see also that the rules of law as to the kinds of future interests which could be created in such chattels real were to some extent modelled on the law as to the creation of future interests in hereditaments.[2]

From the common law relating to hereditaments the idea of one man holding to the use of another was gradually eliminated. The principal reason for this was the nature of the ownership and the character of the interests recognized by the common law in those hereditaments, and the nature of the actions by which this ownership and these interests were protected. The ownership of the freeholder protected by the real actions was much more intense than the ownership of chattels protected only by personal actions; and consequently the law relating to it was much more precisely defined. It followed that the rights and powers of the owners of the interests in the land recognized by the law were more definite than the rights and powers of the owners of chattels. No doubt we must partly account for this phenomenon by the fact that, in the earlier mediæval period, the land law was much more than merely property law.[3] In its rules were contained a large, perhaps the largest, part of the public law of the state. To recognize the interest of anyone not actually seised or entitled to a definite estate in the land would have been to encourage the evasion of obligations upon the due performance of which a feudal society was based. Partly it was due to the fact that the land law, because it was so much more detailed than any other branch of the common law, suffered most from the precocious fixity attained by so many of the rules of the common law.[4] Partly it is due to the fact that the prohibition of the devise,[5] except in a few places by virtue of special custom,[6] prevented the common law from recognizing an executor who held on account of another, and allowed it only to recognize an heir who held on his own account.[7]

But this elimination of the interest of the man on whose account another holds was not effected without an effort. In the twelfth and early thirteenth centuries it was by no means certain that his interest would not be protected. It is clear both from extant conveyances, and from cases which came before the courts, that men were in the habit of enfeoffing others

[1] Vol. iii 217. [2] Pt. II. c. 1 §§ 4 and 6. [3] Vol. ii 260.
[4] Ibid 591-597. [5] Vol. iii 75-76.
[6] Ibid 271, 273-274. [7] Ibid 575 and n. 8.

with land "ad opus" or "in usum" of others. Thus in the Ramsey cartulary we have a deed of 1080-1087 under which one Eudo "Dapifer Regis," agreed with the abbot that Eudo should have a certain plot of land "ad opus sororis suæ Muriellæ" during their joint lives, and that after their death this and other land belonging to Eudo should go "ad usum fratrum eternaliter."[1] In Bracton's Note Book there are several cases in which the "opus" figures.[2] In 1224 a jury found that a man, before he started for the Holy Land, entrusted the custody of his land to Wydo his brother "ad opus puerorum suorum."[3] In 1233 a jury found that a man enfeoffed his younger son Peter aged seven, and made livery of seisin to him on the land, "et postea tradidit terram illam cuidam Magistro Radulfo sicut ad custodiendam ad opus ipsius Petri, et postea commissa fuit cuidam Davidi similiter ad custodiendum ad opus ipsius."[4] Moreover, the property of the religious houses was often appropriated to specific uses; and these appropriations often gave rise to disputes which familiarized persons with the idea that one man may hold to the use of another. Thus Maitland points out that, at one stage in the quarrel between the archbishop of Canterbury and the monks of Canterbury, "Henry II. received from the archbishop's hand three manors, 'ad opus trium obedientiariorum, cellarii, camerarii, et sacristæ'."[5] In fact so common was the practice in the first half of the thirteenth century, that a jury, after finding that a certain Robert held a hundred, could be asked "ad opus cujus, utrum ad opus proprium vel ad opus ipsius Ricardi." Upon this question the jury said that they were ignorant;[6] and no doubt the impossibility of finding out facts of this kind by means of a jury was a powerful cause inducing the common law to ignore them. Of seisin and its livery the jury could speak, but uses were beyond their ken. Therefore the judges declined to recognize any right save that of the person seised.

The age of Bracton was an age in which this and other fundamental questions were open.[7] We have seen that it

[1] Ramsey, Cart. ii 257-258, cited P. and M. ii 232, and cp. other instances there cited.

[2] See ibid 233 for a list of these cases.

[3] Bracton's Note Book no. 999, "Et Robertus post mortem patris sui tenuit eandem terram . . . et habuit filios et ivit in terram sanctam, et commisit terram illam custodiendam Wydoni fratri suo ad opus puerorum suorum."

[4] Ibid no. 754; cp. nos. 641, 1244, 1683, 1851.

[5] P. and M. ii 234.

[6] Cited ibid 233 from Assize roll no. 1182 m. 8—"Dicunt [juratores] quod expleta inde capit, sed nesciunt utrum ad opus suum proprium vel ad opus ipsius Ricardi quia nesciunt quid inde fecit."

[7] Vol. ii 246.

was by no means settled what men could, and what they could not do by means of the conditions which they imposed upon their gifts.[1] It was by no means settled that lands could not be made devisable by this means.[2] Considerations of public policy, the legislation of Edward I.'s reign, and the change in the character of the men by whom the law was administered, settled these questions. The use was banished from the land law; and elasticity was sacrificed to certainty and fixity. In 1379 the judges, having been consulted by Parliament as to whether a request made by Edward III. to his feoffees to perform certain charges could be recognized by the common law, answered that the common law could take no notice of any limitation upon the estate of feoffees of land unless it complied with the strict rules relating to common law conditions.[3] These conditions must be made at the time of the feoffment, and, as we have seen, they could only be taken advantage of by the feoffor or his heirs.[4] Seeing that they could not be imposed after the feoffment had been made, and that a third person in whose favour they had been imposed could not take advantage of them, it was, in almost all cases, impossible to employ them for the purpose of enforcing the rights of those to whose use another stood seised. Unless the cestuique use was the feoffor himself or his heir, and unless the use in his favour had been declared at the time of the feoffment, his interest was ignored by the common law. Nor could a covenant be any more effectual as it could only bind the parties to it and their heirs.

But the use was too convenient, too widespread, and too familiar an arrangement to disappear in consequence of the attitude of the common law. The attempt of the Franciscans to live without property illustrated its power on a European stage.[5] In England, as elsewhere, the friars soon found themselves in the position of commodatarii, or usufructuaries, or the beneficiaries of an "opus" or a "usus;"[6] and in 1279 the bull *Exiit qui seminat* declared that this usus was not

[1] Vol. iii 102-105; cp. vol. ii 263-264. [2] Vol. iii 75-76.

[3] R.P. iii 60 (2 Rich. II. no. 26), "A laquelle question les ditz Justices disoient, que si le doun suis-dit fuist simple, come dit est, sanz parlaunce devant le doun, ou sur le doun, ou sur la liveree d'aucun charge ou fesaunce que les enfeoffez deussent faire; que par nulle priere faite a eux apres ceo qu'ils furent en possession, nomement par la Chartre de Roi qu'est de Record, le dit doun precedent quel fuist adonques simple ne poet estre fait condicionel."

[4] Vol. ii 594 n. 5.

[5] Lea, History of the Inquisition iii 5-8, 27-30, 130-146; P. and M. ii 229, 235, 236.

[6] Monumenta Franciscana (R.S.) 16 (commodatum), 17 (usufruct), ibid. (ad opus); see ibid 494 for a deed of 1224, and 498-507 for a list of gifts between 1224 and 1351.

property.[1] But an arrangement which makes the legal owner of property the executor of the wishes of the beneficiary with respect to that property, will enable the beneficiary to deal freely and easily and secretly with the property either in his lifetime or after his death. It will give the beneficiary all the advantages of property, and yet leave him subject to none of the legal liabilities which property entails. So valuable a device was not likely to be abandoned by owners of property merely because the common law declined to recognize it. But its widespread adoption naturally raised serious problems for the state. To refuse to recognize its existence was to put a premium on fraud, which was wholly contrary to the current mediæval idea that the ultimate purpose of the law was the maintenance of justice and equity. In 1402 the Commons were praying that a remedy might be provided against "disloyal feoffees" who granted away the lands of which they had been enfeoffed in trust.[2] On the other hand, the recognition and protection of the person to whose use property was held might clearly be made the cloak for frauds and evasions of legal liability, which injured both individuals and the state. This is clear from the statutes of the latter part of the fourteenth century, which were passed to prevent frauds upon creditors, the evasion of the statute of mortmain, and feoffments to uses by disscisors and by tenants of various particular estates.[3] Therefore it comes about that while, on the one hand, the interest of the beneficiary gained protection in the Chancery, on the other, that interest was controlled and regulated by the legislature. With the beginning of this protection and this control a new chapter begins in the history of the use with which I shall deal in the two following sections.

(ii) *The Development of the Use in the Chancery.*

Though we must look to the Salman or Treuhand for the

[1] Lib. v. Sexto xii 3, "Nec per hoc quod proprietatem usus et rei cujusque dominium a se abdicasse videtur, simplici usui omnis rei renunciasse convincitur, qui, inquam, usus non juris. sed facti tantum-modo nomen habens, quod facti est tantum, in utendo praebet utentibus nihil juris." The fact that these Roman law analogies could be used to define the position of a person who received property to the use of another considerably helped forward the development of the principles to be found in Germanic law, cp. Caillemer, L'Execution Testamentaire 549-550.

[2] R.P. iii 511 (4 Hy. IV. no. 112), "Item prient les Communes que par la ou Grantz des Rentz chargez, et auxi Feoffementz des Tenementz en demesne, sont faitz a desloials persones per voie d'affiaunce de perfourmer les Volunteez du tielx Grauntours et Feoffours, lesqueux desloialx persones per fauxine grauntont mesmes les Rentz as autres persones, et les tenantz attorment; et suxi tielx feoffez chargent les Tenementz en demesne sanz assent de lour Grauntours et Feoffours, en quelles cases il n'ad null remedie, s'il ne soit ordeigne par le Parlement"—to this the king replies that he will be advised till the next Parliament.

[3] Below 443-444.

origin of the idea that property could be entrusted by its owner to a person who was bound to deal with it according to the wishes of the owner, the shape which that idea took in English law is wholly the result of the manner in which the interest, both of the man who thus entrusted the property, and of the third persons for whose benefit it was entrusted, was protected by the Chancery. The use of to-day is product of the equitable jurisdiction of the chancellor.[1] Just as the original conception that justice should be done, even at the cost of non-compliance with the strict letter of the law, obtained in England a unique technical meaning, because a separate court was specially entrusted with its administration;[2] so, for the same reason, the interest of the persons to whose use another held property acquired in English law a unique character. The unique character of the English use or trust is the direct consequence of the unique manner in which the principles of equity were developed in England, owing to the fact that their administration was entrusted to a separate court.

The reason why jurisdiction over the uses came, from the first, under the jurisdiction of the court of Chancery, is plain. The inadequacy of the procedure of the common law to try cases which involved a breach of trust was, as we have seen, one of the reasons why the common law refused to recognize them.[3] But this refusal obviously encouraged frauds of the grossest description. The court of Chancery, which set out to do equity, employed a procedure which well fitted it to discover and to remedy such breaches of trust.[4] It was not a court which had but one resource—the jury—for the ascertainment of disputed facts. It could summon the parties before it and examine them. It could therefore get at the real facts of those private arrangements from which uses generally originated. Moreover it was not tied down to any rigid scheme of actions. Conceivably the common law might have enforced the duty existing between the feoffor and feoffee to uses by treating its breach as the breach of a contract. In the first half of the fifteenth century the action of assumpsit would have been capable of giving damages to the feoffor, if the feoffees had dealt with the property in a way inconsistent with the undertaking they had assumed when they received the property.[5] But, by that time, the opportunity had

[1] Ames, Essays, A.A.L.H. ii 742. I agree that Holmes is right in his account of the origin of the use; but I think that Ames is right in pointing out that the peculiarly English development of the use is the product of the equitable jurisdiction of the chancellor; in fact this is true of our whole system of equity, see vol. ii 346-347; the history of the use is merely a particular instance of the general principle.

[2] Above 279, 287; cp. vol. i 449.

[3] Above 413-414.

[4] Vol. v 284-287.

[5] Vol. iii 431-434—such cases would clearly have fallen within the principle of Somerton's Case there cited; cp. Maitland, Equity 28.

been lost—"The chancellor was already in possession."[1] Moreover, for two other reasons the action of assumpsit, even in its developed form, would have been an inadequate remedy. Firstly, the same reason which rendered common law conditions and covenants incapable of doing the work of the use[2] made the action of assumpsit, even in its developed form, an insufficient remedy. It was only the feoffor who could have sued by this action; and in many cases it was not the feoffor, but the persons to whose use the feoffees held, who required protection. We shall see that it was, as often as not, the persons whom the feoffor wished to benefit by his will who appealed to the chancellor for protection.[3] Secondly, to treat the relation created by the grant of property to a use as a contract enforceable by action of assumpsit would not have been satisfactory even to the feoffor. If it had been so treated he would have "exchanged the ownership of property for the inalienable benefit of a promise."[4] What was required was a personal remedy against the feoffees, which, at the same time, was not a remedy of so exclusively a personal nature that it debarred others, besides him who had created the use, from suing upon it. But such a remedy was quite outside anything to be found in the Register of Writs.[5] Therefore, whether we look at the ethical principles upon which the chancellor interfered, or at the procedure of the court of Chancery, or at its freedom from fixed forms of action, we can see that the chancellor and his court were as strikingly fitted, as the common law and the common law courts were strikingly unfitted, to assume jurisdiction over the use.

We can gather from the petition of the commons in 1402[6] that, by the beginning of the fifteenth century, the practice of conveying property to uses was sufficiently common to call public attention to the frauds which resulted from the refusal of the common law to recognize it. This is borne out, not only by the records of the Council and court of Chancery, and the Year Books,

[1] Maitland, Equity 29.

[2] Above 416.

[3] Maitland, Equity 31—"Refer to John of Gaunt's will: consider the disposition in favour of the Beauforts—it would not do to give the remedy to John of Gaunt's heir: he is the very person who is interested in breaking the will;" for this will see Test. Ebor. (Surt. Soc.) i 223-239.

[4] Maitland, Equity 31.

[5] Bacon, Reading on the Statute of Uses (Works, Ed. Spedding) vii 404 notes this peculiarity of the use—"So again I would see in all the law a case where a man shall take by conveyance be it by deed livery or word, that is not party to the grant: I do not say that the delivery must be to him that takes by the deed, for a deed may be delivered to one man to the use of another; neither do I say that he must be a party to the livery or deed, for he in remainder may take, though he be a party to neither; but he must be a party to the words of the grant. Here the case of the use goeth single."

[6] Above 417 n. 2.

but also by the collections of wills of this period. There is a case in which the Council examined a defendant as to a feoffment to uses of lands and chattels as early as 1350;[1] and the earliest known application to the chancellor comes from the last years of the fourteenth century.[2] His jurisdiction grew very rapidly, as it was well established in the first quarter of the fifteenth century.[3] The earliest Year Book case in which a feoffment to uses clearly appears comes from the year 1371.[4] There is another case of the year 1385;[5] and there are several allusions to them in the Year Books of Henry IV.'s reign.[6] It is about the same period that the use begins to make its appearance in wills. The will of Henry Percy of 1349 contains no directions to feoffees to uses.[7] A will of 1355, which contains such directions, is drawn up in the form of a deed, and perhaps operated as an immediate settlement of the property comprised in it.[8] But the will of Lord Latimer (1381) is a true testamentary instrument, and contains numerous directions to the feoffees of his lands.[9] From that time onwards such directions become increasingly common in the wills of all kinds of landowners. We must conclude, therefore, that by the beginning of the fifteenth century the development of the use by the Chancery had begun.

We only occasionally meet with a conveyance of chattels to the use of or in trust for other persons.[10] In the vast majority of cases it is land which is thus conveyed. The reasons are fairly clear. In the first place chattels could be bequeathed by will; and the ecclesiastical courts took much the same view of the duties of the executors to the beneficiaries under a will,[11] as the Chancery took of the duties of the feoffees to uses to the

[1] Select Cases before the Council (S.S.) 33-34; such feoffments are alluded to in a case of 1402, ibid 90.

[2] Godwyne v. Profyt, Select Cases in Chancery (S.S.) no. 45, the date of which is shortly after 1393.

[3] Ibid nos. 40 (after 1398); 71, 72, 99, 100 (Hy. IV.); 104 (1410-1412); 116 (1413-1417); 117, 118 (1417-1424); 122, 123, 126, 127 (1422-1426); 1 Cal. Ch. xiii (Hy. V.); 2 Cal. Ch. iii (Hy. V.).

[4] Y.B. 44 Ed. III. Trin. pl. 34.

[5] Bellewe, Tit. *Collusion* 99—uses declared by will, the object of the feoffment being to oust the lord of his wardship.

[6] Y.BB. 5 Hy. IV. Hil. pl. 10; 7 Hy. IV. Mich. pl. 1; 9 Hy. IV. Mich. pl. 23; 10 Hy. IV. Mich. pl. 3; 11 Hy. IV. Hil. pl. 30.

[7] Test. Ebor. (Surt. Soc.) i 57-61.

[8] Ibid 67, 68; cp. Rothendale v. Wychingham (Hy. V.) 2 Cal. Ch. iii; however it was decided in Henry VIII.'s reign that, where a man made a feoffment to perform his will, and the will was annexed to the charter of feoffment, and livery of seisin was made thereon, he could alter or revoke the will, though it took effect on the livery, Lyte et Uxor v. Peny (1540), Dyer 49b *per* Shelley J.

[9] Test. Ebor. (Surt. Soc.) i 113-116.

[10] Select Cases in Chancery (S.S.) nos. 72 (Hy. IV); 116 (1413-1417); Wilflete v. Cassyn (Hy. VI.) 2 Cal. Ch. xxxiii-xxxiv; Y.B. 4 Ed. IV. Mich. pl. 20.

[11] Vol. iii 591-594; below 435; vol. v 316-320.

cestuique use. In the second place the actions of debt, detinue, and account gave a fairly adequate remedy when chattels or money had been bailed to the use of a bailor or a third person.[1] In the third place we should remember that, at this period, chattels mainly consisted of destructible things such as furniture, armour, clothes, or books.[2] Mainly for this reason permanent trusts of these things are not very common even at the present day.[3] It is not until the appearance of accumulations of capital invested in the form of transferable stock that we get forms of personal property which partake of the permanent character of land. It is not until then that trusts of personalty will become as general and important as trusts of realty. But we have seen that capital was only just beginning to make its appearance in the economic world at this period;[4] and the appearance of transferable stock was still in the future.[5] For these reasons the early history of the use is the history of the use of land.

I shall summarize the history of the development of these uses by the court of Chancery from the end of the fifteenth century to the passing of the Statute of Uses under the following heads:—(*a*) The creation of the use; (*b*) the capacity to be a feoffee to uses or a cestuique use; (*c*) the position of the feoffee to uses; (*d*) the nature of the interest of the cestuique use; (*e*) the incidents of the interest of the cestuique use.

(*a*) *The Creation of the Use.*

By the end of this period uses might either (α) be expressly created, or (β) arise by operation of law, or (γ) be implied from the acts of the parties. The first method was the oldest and during the mediæval period the most ordinary, the second arose later, and the third latest of all.

(α) To create a use expressly, the legal estate must be conveyed by feoffment,[6] fine,[7] or recovery[8] to one or more feoffees. It is most unusual to find only one feoffee.[9] They are usually

[1] Vol. iii 336-337, 348-349, 425-428; above 413.

[2] More valuable chattels would often be heirlooms, and regarded as land; for a good modern statement as to the law relating to them see Hill v. Hill [1897] 1 Q.B. at 494-496 *per* Chitty L.J.

[3] As Maitland says, Collected Papers iii 333, "As to dealings with movables inter vivos, we cannot say that there is any great need for a new *Rechtsinstitut*. It is true that in the fourteenth century this part of our law is not highly developed. Still, it meets the main wants of a community that knows little of commerce."

[4] Above 317. [5] Pt. II. c. 4 I. §§ 3 and 4.

[6] See e.g. Arundell v. Berkeley (Hy. VI.) 1 Cal. Ch. xxxv.

[7] See e.g. Test. Ebor. ii 154-156 (1449).

[8] Madox, Form. no. 748 (1514).

[9] There is an instance of one feoffee only in 2 Cal. Ch. xxxvi (Hy. VI.) and lxxv (Rich. III.).

a party, and sometimes a large party of persons.[1] The reasons are obvious. If there was one feoffee only the risk of fraudulent dealing was increased; if he died, the estate of which he was enfeoffed became liable to dower and to the feudal incidents;[2] and, if he died without an heir, it escheated to the lord who was not bound by the use.[3] Thus we find that if the number of feoffees was getting low steps were generally taken to enfeoff others.[4]

The uses to which these feoffees held were sometimes declared at the time of the conveyance, either verbally[5] or in writing.[6] But in a large, and perhaps the largest, number of cases the uses were declared by the will of the feoffor. Occasionally the will which makes this declaration takes the form of an indenture.[7] Often it is in a part of the will separate from that in which the chattels are disposed of;[8] and occasionally a will alludes to another document in which the uses are more fully declared.[9] Sometimes the land is left just as if it were a chattel;[10] but this is most usual in the case of burgage tenements devisable at common law. We may take as a typical example of the manner in which uses were thus created the introductory words to an elaborate settlement of real estate made by the will of Roger Flore Esquire of London and Oakham[11] in 1424-1425:—"And moreover, for als mykyle as at diverce feffementes that I had mad to diverce men of certeyn part of my londes, to the entent that they shulde do my wylle lyke as in sum wrytynges and condicions upon the same feffementes it is more pleynly conteyned, And also, for als mykel as divers men haf joint astate

[1] E.g. Test. Ebor. iv 72 (1493) there are nine feoffees; ibid v 184 (1524) there is a direction to enfeoff six, eight, or more feoffees.

[2] Maitland, Equity 27; cp. the petition to Parliament of the feoffees of Henry V.'s will, cited vol. ii 482-483; Y.B. 14 Hy. VIII. Mich. pl. 5 p. 5 *per* Newdigate *arg.*: for the later law on this point see below Pt. II. c. 1 § 4.

[3] Below 433.

[4] We get an illustration of this in Peverall v. Huse (Hy. VII.) 1 Cal. Ch. cxxii; the two surviving feoffees enfeoff two others to the same use, who enfeoff the original two with four others; cp. Select Cases in Chancery (S.S.) no. 118; Test. Ebor. v 321 (1531) there is a direction that when the number of feoffees sinks to two or three, six others are to be appointed.

[5] Y.B. 27 Hy. VIII. Pasch. pl. 22 (p. 8) *per* York *arg.*; 1 Cal. Ch. xliii (Hy. VI.) —a parol feoffment made by the feoffor on his death-bed; Madox, Form. no. 749 (1536); Rolfe v. Hampden (1541) Dyer 53b—agreed that a will of land (before Henry VIII.'s statute, below 465-466) need not be in writing.

[6] Edlyngton v. Everard (Hy. VI.) 1 Cal. Ch. xxxi; cp. Test. Ebor. ii 256 (1462) —feoffees were directed by the will to make an estate to the testator's son, "according unto the dede of feoffement afore made."

[7] Above 420 n. 8.

[8] See e.g. Test. Ebor. i 223, 236 (1379); ii 216, 221; iii 43; iv 125, 165, 229, 272; Furnivall, Fifty Earliest English Wills (E.E.T.S.) 59, 121.

[9] Above n. 6.

[10] Test. Ebor. ii 89; iii 238-241, 286; iv 2, 92, 123, 247.

[11] Furnivall, Fifty Earliest English Wills (E.E.T.S.) 59, 60; see App. II. for the provisions of this will.

whit me in diverce of my purchace be wey of truste for to fultylle my wille when I required hem, or declared it to hem, Nowe I declere here my laste wille, als well to my saide feffees as to my joint feffees." Then follow the directions to the feoffees.

(β) It happened in many cases that a man conveyed his land to feoffees on the understanding that they held to his use until he gave them further directions.[1] In such a case he continued his possession and enjoyed the profits. Such an arrangement was so common that if there was a feoffment to feoffees, and the feoffor continued his possession and enjoyed the profits, the law implied a use in the feoffor's favour, and a corresponding duty in the feoffees to make estates according to his directions.[2] It is possible that the courts may have been helped to this conclusion by the provision usually inserted in Acts of attainder of the fifteenth century, that lands held to the use of the person attainted should be forfeited to the crown;[3] for in Henry IV.'s reign the continued enjoyment by an attainted person of the profits of land which he had conveyed was treated as a proof that the land was held to his use.[4] However that may be, it was laid down in Edward IV.'s reign that whenever a man conveyed land to feoffees without express declaration of a use, the use resulted to him, and he could deal with it as he pleased by will or otherwise.[5] But, it may be said, if the law is stated so generally, how are we to tell whether or not, when one man enfeoffs another, and makes no express declaration of uses, a feoffment to uses is intended? Of course if, as was often the case, he continued his possession

[1] See e.g. Madox, Form. no. 354 (1506)—a conveyance to nine feoffees, "ad usum mei prædicti comitis (the Earl of Surrey the feoffor) hæredum et assignatorum meorum, ac ad intencionem inde perimplendi ultimam voluntatem mei prædicti comitis."

[2] Thus in Brent's Case (1583) 2 Leo. at p. 15, Manwood J., said, "I have seen divers ancient deeds of uses: and in ancient time, you shall not find that any would purchase lands to himself alone, but had two or three joint feoffees with him, and he who was first named in the charter of feoffment, was cestuy que use, although that no use was declared unto him upon the livery, and so it was known by the occupation of the lands."

[3] See e.g. 11 Richard II. c. 3; 5 Henry IV. c. 1; 7 Henry IV. cc. 5, 12; 1 Edward IV. c. 1 § 14; 26 Henry VIII. c. 13 § 4 made a general rule that the use was to be forfeited for treason; on the other hand, provision was generally made that lands which the attainted person held to the use of others should not be forfeited, thus 21 Henry VIII. c. 25 makes this provision in favour of those to whose use Wolsey held.

[4] Y.B. 11 Hy. IV. Hil. pl. 30—a petition of a feoffee to the king for land seized in consequence of the forfeiture of the earl of Northumberland under an Act of attainder, which declared that land held to his use should be forfeited; it appeared that after the feoffment made by the earl he took the profits, "pur que les Justices dirent en ceo case que le Counte duist forfaiter."

[5] Y.B. 5 Ed. IV. Mich. pl. 20, "Si home enfeoffa autre sans limit entent, et il ferra volunte apres, le darrein volunte serra observe, mes si feoffment fuit fait a ascun entent certein, ce serra observe tantum sans varians, sinon que l'entent soit al use le feoffor et ses haires, il poet varier et sans novel volunte, pur ce que estranger n'ad pouvoir entrer;" cp. Litt. §§ 463, 464.

the case was clear enough. But if he did not, could a use arise in his favour if it had not been expressly declared? The answer to this question was found in the extensive use which Chancery was beginning to make of the distinction between gratuitous conveyances and conveyances for value.[1] The test as to whether, in the case of a feoffment on which no uses had been declared,[2] a use resulted to the feoffor came, by a very natural development, to be, not necessarily the continued enjoyment of the land by the feoffor, but the presence or absence of valuable consideration for the feoffment.[3] As Bacon put it, "Because purchases were things notorious and trusts were things secret, the chancellor thought it more convenient to put the purchaser to prove his consideration than the feoffor and his heirs to prove the trust; and so make the intendment towards the use, and put the proof upon the purchaser."[4] This gave rise to the modern rule, ascertained as early as 1521 if not earlier, that whenever one man enfeoffed another without consideration a use results by operation of law to the feoffor.[5]

(γ) At the beginning of the sixteenth century it was clear that if A bargained and sold lands to B, A would be henceforth seised to the use of B.[6] In other words the creation of the use would be implied from a bargain and sale. That a use would be thus implied from a bargain and sale was not perhaps quite clearly settled in Henry VII.'s reign; but there was a good deal of authority in favour of this view even then;[7] and it had prevailed

[1] See Y.B. 21 Henry VII. Hil. pl. 30 *per* Rede J.; and cp. Y.B. 20 Henry VII. Mich. pl. 20; Doctor and Student ii cc. 21 and 23.

[2] If a use had been declared the presence or absence of consideration made no difference, Perkins, op. cit. § 537; Brook, Ab. *Feffementes al uses* pl. 40 (24 Hy. VIII.) *per* Norwich; Sanders, Uses (5th Ed.) i 59-60.

[3] Rede said in the Y.B. cited in note 1, "Et donques al auter matiere, le quel cest covenant changera un use maintenant, ou nemy; semble a moy que non: uncore *gratia argumenti*; jeo veux agreer que ou on est seisi a son use demesne, si il vend la terre, per force del sale il serra dit feoffee al use cesty que ceo ema: mes icy il n'est come un bargain et sale de terre est, eins il est merement en covenant; et ceo que gist en covenant ne poit changer un use;" and he went on to cite a case of Sir J. Mordant, in which he had been counsel, where this had been held.

[4] Reading on the Statute of Uses 409-410; as Bacon there points out, "The intendment of an use to the feoffor where the feoffment was without consideration grew long after, when uses waxed general."

[5] 14 Henry VIII. Mich. pl. 5 p. 7 *per* Fitzherbert J.; Doctor and Student ii c. 21, "If a man seised of land make a feoffment thereof, and it appeareth not to what use the feoffment was made, nor it is not upon any bargain or other recompence, then it shall be taken to the use of the feoffor, except the contrary can be proved."

[6] Y.B. 27 Hy. VIII. Pasch. pl. 15 *per* Shelley; pl. 22, "Jeo dy que n'est ascun doubte mes si jeo vend a vous mon use, maintenant sur la vente l'use est change in vous hors de ma person," *per* York *arg.*; Brook, Ab. *Feffementes al uses* pl. 54, 36 Hy. VIII. *per* Hales; above n. 3.

[7] In Y.B. 21 Hy. VII. Hil. pl. 30 (above n. 3) Rede J. expresses no decided opinion, and Tremaile dissents from this view; cp. Ames, Essays in A.A.L.H. ii 744; but in Y.B. 20 Hy. VII. Mich. pl. 20 it is said that on a bargain the use would be changed,

before the passing of the statute of Uses.[1] There were in fact two lines of reasoning by which the lawyers arrived at this conclusion. In the first place, if on a feoffment made without consideration a use resulted to the feoffor, much more on a bargain and sale ought a use to be implied in favour of a purchaser; for, if it is unconscientious that a man who has taken gratuitously should hold to his own use, much more is it unconscientious that a man who has obtained the purchase price of land which he has not conveyed, should continue to hold that land to his own use.[2] In the second place the analogy of a bargain and sale of goods led to the same conclusion. We have seen that by the last quarter of the fifteenth century it was settled that a sale of goods passed the property in the goods.[3] A bargain and sale of land clearly did not pass the seisin—the legal estate in the land.[4] But equity followed the law as to bargains and sales of chattels, and established the rule that a bargain and sale of land passed the use.[5]

In the mediæval period, and for some considerable time later, it was only from a bargain and sale that a use would be implied. Equity only interfered in favour of a purchaser who had given value. An agreement under seal might indeed operate as a binding contract to create a use at a future time. But it could not actually raise a use; and, therefore, the common law courts held that the proper remedy of the covenantee was not a subpœna, but an action for breach of covenant.[6] Even if the covenantor stated under seal that he would then and there stand seised to a use, the instrument operated simply as a contract to create a use at a future date.[7]

But during the sixteenth century we can trace the growth of a feeling that this was too strict a rule. As early as 1505 it had been argued that natural love and affection was a sufficient

and in Y.B. 21 Hy. VII. Hil. pl. 4 Fineux C.J. was clearly of this opinion; and the judges apparently take the same view in Y.B. 10 Hy. VII. Pasch. pl. 13.

[1] Brook, Ab. *Conscience* pl. 25, 32 Hy. VIII. *per* Audley C.; and references cited above 424 n. 6.

[2] A Little Treatise concerning writs of subpœna, Harg. Law Tracts 334, "If a man for a certain sum of money sell another forty pounds of rent yearly. to be precepted of his lands in D, etc., and the buyer thinking that the bargain is sufficient, asketh none other, and after he demandeth the rent, and it is denied him, in this case he hath no remedy at common law for lack of a deed; and thereupon inasmuch as he that sold the rent hath *quid pro quo*, the buyer shall be helped by a subpœna. But if that grant had been made by his mere motion without any recompence, then he to whom the rent was granted should neither have had remedy by the common law nor by subpœna."

[3] Vol. iii 355-357, 426, 436. [4] Ibid 436, 438-439.

[5] This analogy was the ground of the clear opinion expressed by Fineux C.J. in Y.B. 21 Hy. VII. Hil. pl. 4; and cp. above 424 n. 7.

[6] Wingfield v. Littleton (1558) Dyer 162; cp. Y.B. 27 Hy. VIII. Mich. pl. 16.

[7] Y.BB. 20 Hy. VII. Mich. pl. 20; 21 Hy. VII. Hil. pl. 30.

consideration to raise a use, and the judges had taken time to consider their decision.[1] In 1523 Hales J. was clearly of opinion that such a consideration was not sufficient.[2] On the other hand, in Edward VI.'s reign, all the judges resolved that marriage was a sufficient consideration to raise a use, and that even a parol contract based on such a consideration would suffice[3]; and in 1565 it was held that a covenant made in consideration of marriage would raise a use.[4]

It was not until the end of the century that the law was finally settled by the two cases of *Sharington* v. *Strotton*[5] (1565) and *Callard* v. *Callard*[6] (1597). In the former case it was held, after a very elaborate argument, that natural love and affection was a sufficient consideration to raise a use.[7] In the latter case, the Exchequer Chamber, reversing the King's Bench, held that a contract to raise a use in consideration of natural love and affection must be made under seal.[8]

On the whole the conclusion arrived at was not unreasonable. It was clear that there were differences between the kinds of consideration which will raise a use, and the consideration on other formalities needed to validate a contract. A deed made without consideration, though it would pass the property in chattels[9] or give validity to a contract, would not raise a use, because such a deed amounted only to a gratuitous gift.[10] It was

[1] Y.B. 20 Hy. VII. Mich. pl. 20.

[2] Brook, Ab. *Feffements al uses* pl. 54.

[3] Callard v. Callard (1597) Popham at p. 48, where Popham C.J. says, on the authority of Manwood C.B., that all the judges in the Star Chamber had then resolved that, "the use of freehold of land will pass upon a contract by parol, in consideration of marriage;" but two cases reported by Dyer would seem to show that the law was in an uncertain state at this period, Dyer 55a (1542); and 102a (1553).

[4] Assaby v. Manners (1565) Dyer 235a. [5] Plowden 298.

[6] The reports of the case in the King's Bench are in Cro. Eliza 344-345, and more fully in Popham 47; the report of the reversal of the decision in the King's Bench is in 2 Anderson 64.

[7] The Court being asked to give the reason for its decision, Catline said, "It seems to us that the affection of the said Andrew for the provision of heirs male which he should beget, and his desire that the land should continue in the blood and name of Baynton, and the brotherly love which he bore to his brothers, are sufficient considerations to raise the uses in the land. And where you said in your argument *Naturæ vis maxima* I say, *Naturæ bis maxima*, and it is the greatest consideration that can be to raise a use," Plowden at p. 309; on the other hand, it was said in Tyne's case (1601) 3 Co. Rep. at p. 81b, that a feoffment made only in consideration of love and affection could not override a use previously created in consideration of money.

[8] 2 Anderson 64. [9] Vol. iii 357-358.

[10] Above 424; Bacon, Reading on the Statute of Uses 403, 404, notes the peculiarity that a deed must have a consideration in order to raise a use—"they say than an use is but an nimble and light thing; and now contrariwise, it seemeth to be weightier than anything else; for you cannot weigh it up to raise it, neither by deed nor by deed enrolled, without the weight of a consideration. But you shall never find a reason for this to the world's end in the law; but it is a reason of chancery and it is this: that no court of conscience will enforce *donum gratuitum*, though the intent appear never so clearly, where it is not executed, or sufficiently passed by law."

clear therefore that the court was not tied to the strict rules of contract law in determining the question whether any given consideration was sufficient to raise a use. It was common knowledge that uses were, by the year 1565, extensively employed as part of the machinery of a family settlement. Seeing that a family settlement and an ordinary contract are very different things, it was good sense to hold that the considerations sufficient to validate them might be different. On the other hand, to allow a mere parol agreement, made in consideration of natural love and affection, to raise a use would have rendered the proof of such a transaction very difficult. The same objections applied to it as applied to bargains and sales before the statute of Enrolments.[1] This statute only applied to bargains and sales; but, on that very account, it was good sense to require that a contract by which a use was raised in consideration of natural love and affection should be made under seal.

When Bacon delivered his Reading on the Statute of Uses it was settled law that the two kinds of consideration necessary to raise a use were either payment of money or natural love and affection. It followed therefore that the two forms of contract by which a use could be raised were a bargain and sale or a covenant to stand seised. We shall see that, by that time, the Statute of Uses had caused these two forms of contract to operate as conveyances.

(*b*) *The capacity to be a feoffee to uses or a cestuique use.*

The king could not be a feoffee to uses. The reason for this was, as we have seen, by no means clear in the fifteenth century;[2] but in the sixteenth century the lawyers had come to the conclusion that all gifts made to the king were made to him in his politic or corporate capacity, and that because he was corporation sole he could not, any more than any other corporation, whether sole or aggregate, be seised to a use.[3] On the other hand, he could be cestuique use.[4] A corporation could not be seised to a use both because it had no power to take property to any other use than its

[1] For this statute see below 462. [2] Vol. iii 467-468.

[3] "The reason was, because to the body natural, in which he held the lands, the body politic was associated and conjoined, during which association or conjunction the body natural partakes of the nature and effects of the body politic: and the body politic cannot be seised to a use, no more can the body natural during the time they are together, for it is drawn to the quality and effects of the body politic, which is the greater," Willion v. Berkeley (1561) Plowden at p. 238; cp. Abbot of Bury v. Bokenham (1535) Dyer at p. 8b.

[4] Bacon, Reading 438—"but it behoveth both the declaration of the use and the conveyance itself to be matters of record, because the king's title is compounded of both;" for an instance of a conveyance to the use of Henry VIII. see L. and P. v no. 814 (1532).

own,[1] and because the process of the court of Chancery against the person could not be executed against an artificial body which was neither capable of confidence nor amenable to physical constraint.[2] On the other hand, it is clear from the wording of the Statute of Uses that a corporation which had a licence in mortmain could be a cestuique use.[3]

Aliens and persons attainted could be feoffees to uses; but aliens, persons attainted, and those suffering from other procedural disabilities could not bring actions on behalf of their cestuique use till the law was modified by a statute of 1488.[4] Whether or not an alien could be a cestuique use was a doubtful point.[5] But it would seem that a person attainted could be a cestuique use.[6] However, if a person attainted, who had a fee simple in the use, was executed, it would seem that the feoffees would hold the land to their own use.[7] A villein, unless he belonged to the king, could be a feoffee to uses;[8] and until 1503-1504 he could be a cestuique use. A statute of that year vested his property in the use in his lord.[9] An infant and a married woman could be both feoffees to uses and cestuique use.[10]

It should be noted that during this period the nature of the married woman's interest in land held to her use did not materially differ from the nature of her legal interest in the land itself.[11] It is true that the husband had at this period no right to curtesy out of the wife's equitable estate;[12] but this is really the only substantial difference. She could no more permanently alienate her equitable interest than her legal interest. If she alone or both together attempted to do so, she could, after the termination of

[1] Brook, Ab. *Feffementes al uses* pl. 40 (24 Hy. VIII.); Plowden at p. 103.

[2] Ibid at p. 538, "For it was said that no corporation can be seised to use, for none can have confidence committed to him but a body natural, who hath reason, and is capable of confidence and may be compelled by imprisonment, by the order of the Chancellor of England, to perform the confidence;" cp. vol. iii 484.

[3] 27 Henry VIII. c. 10 § 1; cp. Bacon, Reading 438; Sanders, Uses (5th Ed.) ii 27-28.

[4] 3 Henry VII. c. 16; but possibly the statute did not apply to aliens; and Bacon points out, Reading 437, that, in the case both of aliens and attainted feoffees, the king's title to the land was, after office found, paramount to the use.

[5] Y.B. 12 Hy. VII. Trin. pl. 7 (p. 28) it was argued that he could; and the preamble to the Statute of Uses (below 460 n. 2) assumes that he could; and cp. 1 Rolle Ab. 194, *Alien* A. 8; Sanders, Uses i 59.

[6] The Acts of attainder which specially provide that the land which others hold to the use of the persons attainted shall be forfeited (above 423) prove this; cp. 1 And. 294 (pl. 302).

[7] Vol. iii 71-72; the doctrine of corruption of blood made it impossible that he should have heirs, ibid iii 69.

[8] Bacon, Reading 437.

[9] 19 Henry VII. c. 15 § 4; below 449.

[10] Bacon, Reading 436, 439.

[11] As to her legal interest in the land see vol. iii 525-526.

[12] Vol. iii 188; Doctor and Student, bk. ii c. 22.

the marriage, upset the disposition by a *cui in vita*,[1] just in the same way as she could upset a disposition made by herself or her husband of the legal estate in her land.[2] The chancellor did not at this period attempt to give the wife a disposing power over equitable interests during the marriage; and he thought, rightly enough, that, for the purpose of protecting her interests after the termination of the marriage, the common law writ was sufficient.[3] We must wait till the next century for the development by the court of Chancery of the separate use.[4]

Finally it should be noted that at this period it was only a feoffee of an estate in fee simple who could hold to another's use. A feoffee of an estate for life or in tail could hold only to his own use, because in these cases a tenure was created between feoffor and feoffee. The existence of the tenure always implied fealty, and this duty prevented any presumption that the property could be held to any other use.[5] It was the better opinion that this presumption was *juris et de jure*, i.e. it could not be negatived even by the express declaration of a use.[6] We shall see that this

[1] For this writ see vol. iii 22.

[2] Y.B. 7 Ed. IV. Trin. pl. 8—one was enfeoffed to the use of a woman who married; she sold the land to a third person and took the money; she then asked the feoffee to make an estate to this third person and he did so; then the husband died, and the woman brought a subpœna against her feoffee; it was pointed out that at common law the woman could avoid the sale by a *cui in vita*; the chancellor, on the ground that a married woman could not consent, deliberately followed the law, and, though the woman had had the money, was ready to grant a subpœna not only against the feoffee, but also against the purchaser; he was ready to say that the purchaser must have constructive notice of a fraud on the woman, if he knew that she was married when he purchased. It should be noted that there is an apparently isolated case of 1366 in which a married woman sued her father on an ante-nuptial contract, Select Cases before the Council (S.S.) xxxii, citing Cal. Close Rolls 40 Ed. III. 237-239.

[3] Y.B. 18 Ed. IV. Mich. pl. 4—a feme sole enfeoffed others to her use, and married; she left this property to her husband by her will—could the husband take under her will and oust the heir? The chancellor said, "Le volunte ne poet estre bon, car elle ne poet gainer ne perdre le terre durant le coverture sans son baron, et entant que elle ne poet ceo faire al comen ley . . . le ley de conscience dire issint que son volunte serra issint, et riens a purpose;" cp. 6 Hy. VII. Pasch. pl. 5.

[4] Vol. v 310-315; vol. vi c. 8.

[5] Brook, Ab. *Feffements al uses* pl. 40 (24 Hy. VIII.); Y.B. 27 Hy. VIII. Pasch. pl. 22 p. 10; Co. Litt. 19b; Dyer 8b; Brook, New Cases 90; it was also said that tenant in tail could not hold to a use as it was contrary to De Donis that his issue should be bound, Cooper v. Franklin (1617) 3 Bulstr. at p. 186; Pollard *arg.* in Y.B. 27 Hy. VIII. Pasch. pl. 22 at p. 9 deduced the logical but historically false conclusion that before Quia Emptores no use could have been declared on the seisin of the tenant in fee simple as he then held of the feoffor.

[6] Cooper v. Franklin (1617) Cro. Jac. 400, 3 Bulstr. 184-186; the latter report is by far the fuller, and it is clear from it that Coke, reluctantly following precedent, held that no express use could be declared; Dillon v. Freine (1589-1595) 1 And. at p. 313; Corbet's Case (1599-1600) 2 And. at p. 136; Cromwell's Case (1601) 2 Co. Rep. 78a; Co. Litt. 19b; Plowden 555; 2 Rolle Ab. 780, *Uses* C. 2; *Contra* Brent's Case (1583) 2 Leo. at p. 16 per Manwood J.; Dyer 10a, 186a, 311b, 312a; Perkin's Profitable Book § 557; Godbolt's Report of Cooper v. Franklin at p. 269; Bacon, Reading 436; cp. Sanders, Uses (5th Ed.) i 29, 30; the controversy is of no practical importance to-day as this curious doctrine has never been applied to the equitable trust

curious doctrine, that where a use was thus conclusively presumed by law, no other use could be expressed, probably has some bearing upon the manner in which the Statute of Uses was interpreted in *Tyrrel's Case.*[1]

(*c*) *The position of the feoffees to uses.*

At law the feoffees were the absolute owners of the property of which they had been enfeoffed,[2] and they were subject to all the liabilities of ownership.[3] They were the only people who could take proceedings against those who interfered with their ownership; and if, for instance, a trespass had been committed with the licence of the cestuique use they could take proceedings against him, for he was at law only a tenant at sufferance.[4] Similarly they were the only people who could take proceedings against tenants of the land to compel them to perform their obligations.[5] Thus if debt was brought for rent by a cestuique use, and the defendant pleaded "nihil habuit tempore dimissionis," the plaintiff would have lost his action if he had not made a special replication setting out the facts.[6] At the same time the view that the law wholly disregarded the existence of the cestuique use must not, as Bacon expressed it, and as the case last cited shows, be taken "too grossly."[7] It is true that the ownership of the feoffees was the only ownership recognized by the common law; but this did not prevent the common law from recognizing incidental effects of the existence of the cestuique use.[8] Thus a cestuique use of property to the value of 40s. a year was liable to serve on a jury.[9] A release by a cestuique use to his feoffee was

Sanders, op. cit. 29; probably the only surviving rule due to this doctrine is the rule that there can be no resulting use if less than a fee simple is granted to the feoffees, Norton, Deeds 373.

[1] (1557) Dyer 155a; below 469-470.

[2] Y.B. 4 Ed. IV. Pasch. pl. 9, cited vol. ii 593 n. 4.

[3] Above 422.

[4] Y.B. 10 Hy. VII. Pasch. pl. 13, "Immediatement apres que cesty que use ad vend, ou bargaine son use ove l'estranger, donques il n'ad rien a mesler in la terre; mes quand il est seisi del terre devant ascun bargain ou sale il ne poit doner licence a ascun autre estranger a entrer en la terre, ou faire ascun trespass sur la terre: et auxy les feffees puniront cesty que use, s'il (the stranger) vient sur la terre."

[5] Y.B. 5 Hy. VII. Hil. pl. 4, "Nota que fuit tenu per touts les justices de common banc que le feoffor, ou il ad feffees a son use, ne poit justifier la pris de distress damage feasant en la terre que est en feffement en son nom demesne, eins en les noms des feffees, car il ad rien en la terre par la common ley, eins occupation al suffrance des feffees;" cp. S.C. 5 Hy. VII. Trin. pl. 23.

[6] Y.B. 2 Hy. VII. Mich. pl. 18, cited Bacon, op. cit. 399.

[7] Bacon, op. cit. 399.

[8] "The sense of it is, that an use is nothing for which any remedy is given by the course of the common law; so as the law knoweth it, but protects it not: and therefore, when the question cometh, whether it hath any being in nature or in conscience, the law accepteth of it," Bacon, op. cit. 399.

[9] Litt. § 464.

a good consideration for a contract.[1] The existence of the relationship between feoffees to uses and cestuique use was a good plea to an action for maintenance.[2]

In equity the feoffees to uses were compelled to use their powers as legal owners for the benefit of the cestuique use. Thus they owed many duties to the cestuique use, and they had certain rights against him. Their duties can be summed up under three heads.[3] Firstly, they must suffer him to take the profits of the land.[4] Secondly, they must make estates in the land in accordance with his directions.[5] These directions might be either verbal or in writing;[6] but they must be clear. The feoffees were entitled to refuse to make estates unless they were certain that the directions given to them expressed the real wishes of the cestuique use. In Henry VI.'s reign a subpœna against two feoffees who refused to make an estate was refused, because there was no clear proof that the cestuique use had commanded such an estate to be made.[7] Thirdly, they must take all necessary proceedings against those who attempted to disturb their seisin, and defend, in accordance with the directions of the cestuique use, all proceedings taken by persons who claimed title to the land;[8] and it was for this reason that, as we have seen, the existence of this relationship was an answer to an action of maintenance.[9] On the other hand, the feoffees could claim as against the cestuique use to be indemnified for all costs and necessary expenses incurred in the fulfilment of these duties.[10] Similarly the expenses of retaining counsel, stewards of manors, and the like, could be charged by the feoffees even against an infant cestuique use.[11] It was clear in Edward IV.'s reign that, if the cestuique use died without heirs, the lord could not claim that the feoffees should hold to his use.[12] The result was that they took beneficially.[13]

[1] Bacon, op. cit. 399.

[2] Y.B. 2 Ed. IV. Pasch. pl. 6 (p. 2) *per* Littleton.

[3] Bacon, op. cit. 401.

[4] Saundre v. Gaynesford (Hy. VI.) 2 Cal. Ch. xxviii.

[5] This is the usual prayer of the early bills in Chancery, see e.g. 1 Cal. Ch. lvii, xci, cv; 2 Cal. Ch. iii, xix, xxiii, xxviii, xxxvi, li, lxvii, lxxv.

[6] Y.B. 27 Hy. VIII. Pasch. pl. 22 *per* York *arg.*; Bacon, op. cit. 425, 426, distinguishing the raising from the transferring of a use, says, "It is clear that *an use in esse* by simple agreement, with consideration or without, or likewise by will, might be transferred;" Callard v. Callard (1597) 2 And. 64, above 426 n. 6.

[7] Y.B. 37 Hy. VI. Trin. pl. 23—There were four feoffees; cestuique use asked two to make a feoffment to X, and they informed the other two who refused to make the feoffment; cestuique use then asked the latter two to enfeoff Y, and they did so; cp. 2 Cal. Ch. (Ed. IV.) xl, xli, for a case where, apparently, contradictory directions had been given to the feoffees.

[8] Y.B. 7 Ed. IV. Hil. pl. 15 (p. 29), "Nota que il fuit tenu per les Justices que un feoffee de trust est tenu de pleder touts plees, et maintenir action pur la terre, sicome a luy que use etc. voilloit pleder, mes ce serra a costes de cesty que use."

[9] Above n. 2.

[10] Note 8 above.

[11] Y.B. 8 Hy. VII. Pasch. pl. 3.

[12] Y.B. 5 Ed. IV. Mich. pl. 18.

[13] Brook, Ab. *Feffements al uses* pl. 34.

(d) The nature of the interest of the cestuique use.[1]

In early days the relation between the feoffee to uses and the feoffor or cestuique use was of a strictly personal character. In 1483 Huse said that it had been settled law for the last thirty years that no subpœna would lie against the heir of a feoffee[2]; and this view of the law is borne out by a case reported in 1469.[3] But in 1483 this view of the law was antiquated. The Chancellor pointed out to Huse that there were precedents in Chancery which showed that not only was the conscience of the original feoffee affected by the use, but also the conscience of his heir, and of other persons taking the estate in the land through him.[4] In fact in 1466 it had been laid down that the conscience of any one was affected who obtained the estate in the land from the feoffees with notice of the use;[5] and, applying the principle that one who was enfeoffed without consideration held to the use of the feoffor,[6] the conclusion was easy that the conscience of any one to whom the estate was gratuitously conveyed by the feoffees to uses, was likewise bound whether or not they had notice of the use.[7] But further than this the Chancellor would not go. The conscience of a purchaser for value without notice from the feoffees was not affected, and therefore he was not bound by the use.[8] In other words, anyone, save a purchaser for value without notice, who took "*per*" the feoffees must respect the use.

But, as Coke pointed out in *Chudleigh's Case*,[9] this reasoning did not apply to those who got an interest in the land otherwise

[1] It should perhaps be noted that in many cases the feoffor to uses was himself the first cestuique use. In this section I include his interest when this is the case. Of course, because he was the creator of the use, he had much larger powers than any other cestuique use of directing the feoffees to uses; thus, as is pointed out by Shelley J. (Dyer 49b), it was held that if a man made a feoffment to perform his will, and the will was annexed to the charter of feoffment, and livery of seisin was made in accordance therewith, the will could be altered or revoked.

[2] Y.B. 22 Ed. IV. Pasch. pl. 18, "*Hussey le Chief Justice de Bank le Roy*, Quand jeo venue primiere al Court, lequel n'est passe xxx ans, il fuit agree en case per tout le Court, que si home ust enfeoffe un autre de trust, s'il morust seisie, issint que son heir fuit eins per discent, que donques nul *Subpœna* ne gist."

[3] Y.B. 8 Ed. IV. Trin. pl. 1, "Et fuit move si *Subpœna* gist vers executor ou envers heire. Et *Choke* dit, que il sua autrefoits *Subpœna* vers le heire de un feoffee, et le matiere fut longuement debate. Et l'opinion de la Chancellor et les Justices que il ne gist pas envers le heire, per que il sua un bill al Parliament etc."

[4] Y.B. 22 Ed. IV. Pasch. pl. 18, "Le Chancellor dit, que est le comen course en le Chancery pur granter (subpœna) . . . sur feoffement de trust lou l'heir le feoffee est eins per discent ou auterment, car nous trouvomes recorde en le Chancery de tiels;" cp. Saundre v. Gaynesford (Hy. VI.) 2 Cal. Ch. xxviii.

[5] Y.B. 5 Ed. IV. Mich. pl. 16, "Si J. enfeoffa A. a son use, et A. enfeoffa R. nient obstant que il luy vende etc. si A. dona notice a R. del entend del primer feoffment, il est tenu per breve de *Subpœna* de perfourmer le volonté."

[6] Above 424.

[7] Y.B. 14 Hy. VIII. Mich, pl. 5 p. 7 *per* Fitzherbert J.; cp. Y.B. 5 Ed. IV. Mich. pl. 16.

[8] Y.B. 14 Hy. VIII. Mich. pl. 5 p. 8 *per* Brook J.

[9] (1585-1595) 1 Co. Rep. at p. 122a.

than "*per*" the feoffees. Such a person had no privity of estate with the feoffees; and, as a use is a confidence annexed in privity to the feoffee's estate, a person who got the land otherwise than through the feoffees was not bound by the use.[1] Thus neither a disseisor, an abator, an intruder, nor a person who took by a title paramount to the title of the feoffees were bound;[2] nor, for the same reason, was the lord to whom a surviving or sole feoffee's estate escheated.[3] These conclusions had been reached by the beginning of the sixteenth century; and when they had been reached, the root principle of the equitable ownership of modern English law had been ascertained.

It was a wholly unique form of ownership which the chancellor had thus developed from a conscientious obligation of a very personal kind. It was not a true *jus in rem* because it was not available against the whole world. There were or might be many persons as against whom it could not be asserted. Then, although it rested on the chancellor's power to proceed against the person whose conscience was affected by notice of the use, it was far more than a mere *jus in personam*. It could be asserted against many persons besides the original feoffee, and by many persons who were not parties to the original feoffment. A right of so peculiar a kind could probably never have been invented by lawyers who had a firm hold of the Roman distinction between

[1] "And although that in our case the feoffee had notice, yet because he was in of another estate, so that the privity of estate failed, for that reason he shall not stand seised to the use, for the use is a confidence annexed in privity to the estate of the land. And therefore there is a difference between things annexed in privity to the estate of the land, and things annexed to the possession of the land without respect of any privity: and therefore a disseisor abator or intruder shall not be seised to a use although he hath notice; for the use was not annexed to the possession of the land which each of them hath, but to the privity of the estate which is denied to them all, for they are not *in* in privity to the estate to which the use was annexed, but in the '*post*,'" Chudleigh's Case, 1 Co. Rep. at p. 122a; cp. Y.B. 14 Hy. VIII. Mich. pl. 5 p. 8 *per* Brook J.; Brook, Ab. *Feffementes al uses* pl. 40 (24 Hy. VIII.); Y.B. 27 Hy. VIII. Mich. pl. 21 *per* Fitzherbert; Delamere v. Barnard (1568) Plowden at p. 352; Abbot of Bury v. Bokenham (1535) Dyer at pp. 10a, 12b; the expressions "in the *per*" and "in the *post*" were borrowed somewhat happily from the various writs of entry, vol. iii 13. It may be noted that the rules relating to the common law action of account (the rules of which present a marked resemblance to rules of equity, vol. v. 288, 315, 316) present a close analogy; it was said in Mary's reign that, "Account lies not against disseisors for . . . The defendant was never his receiver for to render account, for this cannot be without privity in law or in deed," Brook, New Cases (March's Tr.) 7; cp. Street, Foundations of Legal Liability, iii 103.

[2] Chudleigh's Case, loc. cit. at p. 139b, "The reason why the lord by escheat, or the lord of a villein, should not stand seised to a use is because the title of the lord is by reason of his elder title, and that grows either by reason of the seignory of the land or of the villein, which title is higher and elder than the use or confidence is; and therefore shall not be subject to it."

[3] Last note; and cp. Y.B. 14 Hy. VIII. Mich. pl. 5 p. 5 *per* Newdigate *arg.*; for some differences between these rules and those applicable to the later equitable interests developed after the passing of the Statute of Uses see Pt. II. c. 1 § 2.

dominium and *obligatio*, or of the modern distinction between jura in rem and jura in personam.[1]

The interest of the cestuique use was a very relative kind of ownership. His power of compelling the feoffees and others bound by the trust to use their legal powers for his benefit, gave him practically all the rights of an owner against these persons, and as against the world in general; but he had none of these rights as against certain defined persons.[2] This relativity probably seemed natural to men who were familiar with the various rights to seisin—relatively good or relatively bad—which were recognized by the mediæval common law.[3] But here again we may doubt whether it could have been invented by lawyers who had grasped the distinction drawn by the Roman lawyers between dominium and the various subordinate possessory or quasi-possessory rights which they recognized. It is true that there is a certain relativity in the rights of bonitarian owners, bonorum possessors, and usucapion possessors. They are owners as against the world in general; but there may be another who can assert a better legal right. But there was no permanence in this relativity. The expiry of the period fixed for usucapion soon put an end to it. There was on the other hand a very permanent relativity in the various rights to seisin and possession recognized by the common law. It was no uncommon spectacle in the fifteenth century to see disseisors enjoying substantial ownership, and disseisees making continual claim, and constant attempts to assert their rights by entry or action.[4] Many estates might exist contemporaneously in the same land; and, in the case of chattels, there might be a bailor, a bailee, and perhaps a third person to whom the bailee had contracted to hand over the goods.[5] Similarly there was a very permanent relativity in the rights of the cestuique use. As against certain persons he had, to the extent of his interest, substantial ownership: as against other persons he had no rights at all. This division, therefore, between legal seisin vested in a feoffee to uses, and an equitable right in a cestuique use to get seisin or to have the feoffee's seisin employed for his benefit, might appear to be merely another instance of that division between actual seisin and a right to get seisin with which the common law was abundantly familiar.

Nevertheless there was a great and a fundamental difference between the principle which underlay this division between the rights of the feoffee to uses and the cestuique use, and the

[1] Maitland, Equity 23, 24.
[2] Above 432-433.
[3] Vol. ii. 351, 583-588.
[4] Ibid 585.
[5] As to the question how far the common law recognized the existence of successive interests in chattels see Pt. II. c. 2 § 2.

principle which underlay the various cases of divided ownership recognized by the common law. A comparison between these principles will help us to understand the very striking peculiarities of this new juridical conception which have, as we shall see, enabled it to influence so many branches of our modern English law.

In all the cases of divided ownership recognized by the common law—whether it is a case of tenant for life or remainderman, or lessee for term of years and sublessee, or bailor and bailee—each owner has his separate right which is recognized by law as belonging to him absolutely. The actual enjoyment of the property over which the right exists may be postponed; the right itself may be inalienable;[1] but, for all that, the right confers a definite proprietary interest on the person entitled which he may deal with for his own benefit in any manner permitted by the law. But in the case of a feoffment to uses the feoffee has the whole legal ownership of the feoffor vested in him. He is not like a bailee whose right is limited by the rights of his bailor, or a tenant for life whose rights are limited by the rights of a reversioner or remainderman. His legal rights are unlimited by the existence of any rival claimant. But these absolute rights he must exercise for the benefit of another person—the cestuique use. He holds them on account of another.[2] The only real parallel to the relationship of feoffee to uses and cestuique use is the relationship between the executor who has paid all his testator's debts and a legatee. In substance his relation to the legatee is similar to the relation between the feoffee to uses and the cestuique use.[3] Even at the present day the difference between an executor and a trustee is often fine. It was fine at the end of the fifteenth century.[4] Testators sometimes made their feoffees to uses their executors;[5] and bills were filed in Chancery against them.[6]

The practical results of this difference in principle were

[1] Vol. iii. 92.

[2] Maitland, Equity 45, 46. The difficulty of distinguishing these allied conceptions arises partly from the fact that they spring from the same root, above 413; the fundamental difference nevertheless existing in modern law illustrates the entirely different turn which the use took owing to its development by the court of Chancery, and justifies Ames' view, Essays in A.A.L.H. ii 742 that the modern use is the product of the equitable jurisdiction of the chancellor.

[3] Ibid 48, 49.

[4] Y.B. 4 Ed. IV. Mich. pl. 20—The Chancery and the ecclesiastical courts were in conflict over an executor who was also a trustee.

[5] Furnivall, Fifty Earliest English Wills (E.E.T.S.) 118—all property in use is left to executors; Test. Ebor. ii (1444) 130-134 some of the feoffees are clearly executors; Felbrigge v. Damme (Hy. VI) 2 Cal. Ch. xxiii.

[6] Polgrenn v. Feara (Hy. VI.) 1 Cal. Ch. xxxix; Prior of St. John v. Clyffe (Ed. IV.) ibid cx, cxi; Select Cases in Chancery (S.S.) nos. 37 (after 1397), 104 (1410-1412), 109 (1407-1409), 140 (1454).

enormous. We have seen that it was the presence of the executor which enabled a testator to effect so much by his will.[1] Similarly it was the existence of a feoffee to uses, who must act in accordance with the wishes of the feoffor or the cestuique use, which enabled landowners to effect so much by a feoffment to uses. Why then does the presence of the executor or the feoffee to uses so much increase the powers of the owners of property? The answer is that it increases their powers because the common law is not the only system of law in force in England. Both the executor and the feoffee to uses were compelled by a set of rules external to the common law—by the ecclesiastical law or by rules of equity—to use the powers belonging to them by the common law as another directed.[2]

Let us see what consequences this involves. The owner of property has over that property indefinite rights to use or abuse. It is true that, because he is the owner of property, the law imposes upon him various liabilities to pay taxes, to serve on a jury, and the like. It is true that if he wishes to deal with his property the law will impose conditions both as to the form and as to the substance of these dealings. It will say, you shall not convey without a livery of seisin; you shall not dispose of your land by your will. If you try to do these things they will not be recognized by the law. But the law cannot define the innumerable things which an owner may or may not in fact choose to do by virtue of his ownership. It cannot, for instance, prevent him from allowing X to occupy the property till he marries, nor can it prevent him on the happening of that event from allowing Y to occupy it for his life, nor can it prevent him from then allowing a devisee under Y's will to occupy it. It may refuse to recognize the validity of limitations which purport to effect such an arrangement. But it cannot prevent a man from allowing his property to be in fact enjoyed in this way. But if an arrangement is made under which an owner can be compelled by rules, external to the rules of law, to use his indefinite rights of ownership for the benefit of another person, the other person will be able to effect through the owner an indefinite number of things. Unless these things are positively illegal the law does not prevent an owner from doing them—after all he is owner; and the rules external to the

[1] Vol. iii 558-559.

[2] From this point of view there is an analogy to the fideicommissum of Roman law, since the heir or other person charged was compelled to use his legal powers by the *extraordinaria cognitio*; moreover, the results were not dissimilar; if we compare the variety of purposes which could be effected by fideicommissum, and the certainty in effecting them, with the small number of purposes that could be effected by a *legatum*, and the uncertainty in effecting them, owing to the rigid rules which governed *legata*, we cannot help noticing the similar results which a similar device produced.

rules of law—the ecclesiastical law or the rules of equity—will make it obligatory on him to do them. Thus it becomes possible for an owner, who has conveyed his property to an intermediary, to achieve a large number of things, because he has at his command the indefinite powers involved in the ownership which he has conferred on this intermediary. And by taking appropriate measures to fill up vacancies in these intermediaries caused by death, they may be rendered practically a permanent body. Therefore the owner, through the agency of this body, may control the fate of the property long after his death. He dies, but his powers of ownership survive through the directions which he has given in his lifetime to these intermediaries. Moreover, seeing that he has conveyed his legal ownership to another, he incurs none of the liabilities of ownership. Thus a testator who can lay commands on an executor which will be enforced by the ecclesiastical courts, and a feoffor or cestuique use who can lay commands on a feoffee to uses which will be enforced by the court of Chancery, gain a range of powers limited only by positive legal prohibition, or by the rules laid down by the ecclesiastical courts or by the court of Chancery. When this result has been reached, it becomes necessary for these courts to lay down some rules as to the sort of commands which an executor or a feoffee to uses can be asked to obey. In other words, it must define the incidents of this equitable ownership which it has created.

(*e*) *The incidents of the estate of the cestuique use.*

In moulding the incidents of the estate of the cestuique use the chancellor necessarily started from the basis of the ownership recognized by the common law; for, as we have seen, the rules of equity were in all cases founded upon the basis of the common law.[1] Thus the rules of inheritance[2]—even the doctrine of possessio fratris[3]—and the rules as to the kinds of estate in the use which could be created by a feoffor followed common law rules.[4] But it must be admitted that upon the latter topic equity followed the law very critically. If a doctrine of the common law seemed to be inequitable the chancellor refused to follow it. He would have nothing to do, for instance, with the doctrine of collateral warranty.[5] He would not allow

[1] Above 280. [2] Y.B. 5 Ed. IV. Mich. pl. 16.

[3] Y.B. 5 Ed. IV. Mich. pl. 17—a conclusion denied by Anderson C.J. in Corbet's Case 2 And. at p. 146.

[4] As Glanville J. said in Corbet's Case (1599-1600) 1 Co. Rep. at p. 88a, "The makers of all the statutes concerning uses and all other statutes have made uses to imitate and resemble estates in possession."

[5] Y.B. 3 Hy. VII. Mich. pl. 14; cp. Bacon, Reading 403; for this doctrine see vol. iii 118.

the use to escheat on the attainder of the cestuique use.[1] At this period he sometimes allowed an estate of inheritance to be created without the regular words of limitation, if the intent of the parties was clear.[2] We shall see that just about the time of the passing of the Statute of Uses, and for some time after, some lawyers, relying upon the older cases in which the equity had followed the law, held that the incidents of the estate of the cestuique use should follow the rules applicable to legal estates very much more closely.[3] But Bacon, approving the reasoning of Anderson C.J. in *Corbet's Case*, pointed out that this view was incorrect. As he said, the older cases in which the equity had followed the law proved only that, "the chancellor would consult with the rules of law when the intention of the parties did not specially appear."[4] In fact the principle upon which the chancellor acted made it necessary that he should give the fullest effect to the intention of the parties; and to give this effect to their intention it was necessary that the rules which he laid down should diverge widely from the strict, inconvenient, and often unfair rules of the common law.

We have seen that the chancellor's action aimed at compelling the feoffee to uses to fulfil honestly and honourably his undertaking to obey the directions of the feoffor or the cestuique use.[5] Any directions not positively illegal were therefore held to be binding on the conscience of the feoffee. The most common directions were those given by a landowner as to the disposition of his land after his death. For as the sixteenth century law books point out,[6] it was the fact that lands were not devisable that, more than any other single cause, had gained for the use its popularity. By means of directions given to feoffees to uses, landowners got powers over their land similar to and even greater than the powers which they had over their chattels. They could use their land to pay their debts;[7] they could charge it with

[1] Y.B. 5 Ed. IV. Mich. pl. 18.

[2] Brook, Ab. *Conscience* pl. 25 (32 Hy. VIII.), Y.B. 27 Hy. VIII. Pasch. pl. 22 (p. 8) *per* York *arg.*; see below 462 for the law since the Statutes of Uses.

[3] See the argument of Horewood and Pollard 27 Hy. VIII. Pasch. pl. 22.

[4] Reading 402; Corbet's Case 2 And. at pp. 142, 143, there cited; the arguments in favour of the view that uses "were at common law," and that therefore the law relating to them should follow closely the common law, 2 And. at p. 143, Anderson C.J. calls "illusions of the ignorant, and nothing to the purpose to prove that uses were at common law."

[5] Above 431.

[6] Doctor and Student ii c. 22; Bacon, Reading 409; cp. Maitland, Collected Papers iii 335, "The Englishman would like to leave his land by will. He would like to provide for the weal of his sinful soul, and he would like to provide for his daughters and younger sons. That is the root of the matter."

[7] Test. Ebor. ii 222, 223 (1458); cp. Madox, Form. no. 749—land limited to the executors to the uses declared in the will for seven years.

annuities in favour of their relatives[1] or dependants,[2] or with portions to their wives or younger children;[3] they could order it to be sold and the proceeds devoted to charity;[4] and they could found charitable institutions and provide for their management.[5] In other directions also the machinery of the use proved to be serviceable. Provision could be made for a family by marriage settlement far more easily than by the cumbersome machinery of the common law.[6] Finally by their means, gilds, chantries, and unincorporated bodies were in substance enabled to enjoy proprietary rights. The common law was coming to the conclusion that such unincorporate bodies could not own property.[7] In a case of Henry VII.'s reign Fineux C.J. denied that a parish could be a cestuique use of land. He admitted indeed that such property as ornaments appertaining to the church could be held by them or to their use, because such things were necessary to the due performance of the duties of the parish.[8] They might be regarded as a quasi-corporation for this purpose only,[9] and therefore, though they could own such property, they could own no other.[10] But the court of Chancery was quite ready to recognize the ownership of such bodies. In Henry VIII.'s reign the parishioners of St. Clement Danes filed a bill before Sir Thomas More to recover possession of premises belonging to the gild of St. Clement Danes, which had been let for a term of years which had then expired.[11] We have seen that parishes

[1] Test. Ebor. iii 158 (1466) gift to a brother; iv 65 (1491).

[2] Furnivall, Fifty Earliest English Wills 125; Test. Ebor. ii 221.

[3] Ibid i 236, 237—gifts by John of Gaunt to the Beauforts; 349—a gift by Gascoigne C.J. to his wife of an estate in certain lands in lieu of dower.

[4] A very common direction, see Furnivall, op. cit. 33 (1418); 70 (1426); Test. Ebor. iv 66 (1491); 235 (1504); cp. 1 Cal. Ch. lvii, lxii, lxiii, 2 Cal. Ch. xliv.

[5] Test. Ebor. iii 158 (1466); ibid 25 (1404)—the will of Sir William Heron, Lord Say; at p. 26 he charges his feoffees, "yat they make, or elles performe, an hospitall, that is bygunne, of syx or foure pore men at leste, and a preste in chauntrie by wyse and discrete ordinance and discretion perpetuall fore to governe hem."

[6] The Doctor and Student ii c. 22 says, "And sometimes such uses be made, that he to whose use etc. may declare his will thereon, and sometimes for suretie of divers covenants in indentures of marriage, and other bargains, and these two last articles be the chief and principal cause why so much land is put in use;" for the cumbersome character of the common law machinery see vol. iii 250-252; two private acts of Henry VIII.'s reign—3 Henry VIII. c. 16 and 21 Henry VIII. c. 23—give good illustrations of these settlements.

[7] Vol. iii 478.

[8] In such a case the property could be laid in the church wardens who could bring trespass or an appeal if they were taken from them, Y.B. 37 Hy. VI. Trin. pl. 11 *per* Moile J.

[9] Y.B. 12 Hy. VII. Trin. pl. 7 (p. 29) cited vol. iii 477 n. 7.

[10] "Car si un lease pur terme de vie, ou un feoffement soit fait . . . ou per case un lease pur terme d'ans, ou tiels chose qui ont continuance, a ceux choses leur corporation n'extende," ibid; S.C. Y.B. 13 Hy. VII. Mich. pl. 5; note that in 1553 it was said by Bromley C.J. in the Star Chamber that a grant by the king to the inhabitants of a place would make them a corporation for the purpose of taking the property, Dyer, 100a.

[11] Ellowe and others v. Thomas Taylor 1 Cal. Ch. cxxix.

often in fact possessed and managed property in land at this period.[1] The wills of this period show that much property was in the hands of parishes, chantries, and other religious or quasi-religious societies,[2] and justify the statements made in the preamble to the statute of 1531-1532.[3]

The fulfilment of such purposes as these involved the creation of many varied kinds of limited interests in the land, and many different kinds of future estate, which were impossible at law. We have seen that the only future estate in favour of third persons allowed by the common law was the remainder; and that it was not till the latter part of the fifteenth century that the validity of a contingent remainder was beginning to be admitted.[4] We shall see also that the rules regulating the creation of all remainders, whether vested or contingent, were very strict.[5] But at common law the use was nothing at all—not even a chose in action.[6] Therefore over the kind of estates which could be created in it the common law had no control. The validity of the future estates needed to give effect to the directions of the feoffor or the cestuique use was necessarily from the first admitted by the chancellor; and obviously no one of the common law rules could apply to them. Thus land could be given to a certain person till a sum of money had been raised out of the rents and profits, and then over.[7] It could be given to executors for a term of years, and after its determination it could be given to the testator's son in tail.[8] It could be made to go over from one beneficiary to another on the happening of an event.[9] Thus by means of these springing and shifting uses [10] landowners acquired a large and a certain control over the future fate of their property.

[1] Above 153-154.
[2] Vol. iii 545-546.
[3] 23 Henry VIII. c. 10.
[4] Vol. iii 134-136.
[5] Pt. II. c. 1 § 3.
[6] Thus Anderson C.J. said in Corbet's Case 2 And. at p. 147, that the use, "N'ad esse nec essentia, mes est solement imaginacion;" cp. Abbott of Bury v. Bokenham (1535) Dyer at p. 12a *per* Fitzherbert J., "L'use n'est rien en ley, mes est confidence."
[7] Madox, Form. no. 747—feoffees of a manor to stand seised to the use of one of them till he raised out of the profits of the manor a certain sum, and then to certain uses in tail; Test. Ebor. i 222.
[8] Madox, Form. no. 749—settlement to executors for seven years, then to wife for life, then to son in tail, with remainders over.
[9] Furnivall, Fifty Earliest English Wills (E.E.T.S.) 121-128 (1439)—the testator after devising land to his sons in tail provides (p. 128), "that if his wife or any of his saide sonnes worke the contrarye of this his present wille, in lettying or distourbying the said executours of fulfillying thereof, that then they shall lose advantage and benefits of this present wille."
[10] For instances of them see below 441 n. 4, 474-475; a shifting use arises where, on the happening of an event, a use already created passes over to another, e.g. a gift to A and his heirs and, if A marries, to B and his heirs; a springing use arises where, on the happening of an event, a use not already in existence arises, e.g. a gift to A and his heirs to take effect from A's marriage, see Digby, History of the Law of Real Property (4th Ed.) 358.

There was no doubt a danger that this large control might be used to its own destruction, if the property were so settled that it was vested in perpetuity in a succession of limited owners. But it would seem that this danger did not clearly appear during this period. Bacon tells us that it was not till after the passing of the Statute of Uses that settlements deliberately drawn up with this object made it necessary to make rules to prevent its attainment.[1] We shall see that these rules took different forms.[2] One of them gradually developed into the modern rule against perpetuities, which at the present day, threatens to swallow up all the other rules which were created to effect a similar object. At this period the powers of the use were not fully realized; and settlors and testators generally contented themselves with creating life estates or other limited interests in favour of existing persons, followed by a series of estates tail also to existing persons.[3] Under these circumstances it is not surprising to find that, if an occasional settlor wished to make a more elaborate settlement, he was apparently at perfect liberty to do so.[4] Such settlements were so infrequent that the dangers inherent in them were not as yet realized.

The same causes which enabled landowners to get rid of the common law restrictions upon their powers of disposition,

[1] Reading 409—he points out that, "of late years, since the statute (of uses)," one of the reasons for the popularity of uses has been "an excess of will in men's minds, affecting to have assurances of their estates and possessions to be revocable in their own times, and too irrevocable after their own times."

[2] Pt. II. c. 1 § 6.

[3] Joshua Williams, 1 Jurid. Soc. Papers 46-48, says that he has found no trace of a limitation of an estate to an unborn person before 1557; and that, before that date, property was usually settled either on the husband and wife and the heirs of their two bodies in special tail, or on the husband and wife and the heirs of the body of either husband or wife; this is borne out by a petition to Cromwell of a young conveyancer in 1540 (L. and P. xv no. 1028), in which he gave particulars of the settlements which he had been employed to draw; none of them contain remainders to unborn children; it is borne out also by the two private Acts cited above 439 n. 6. Thus it would seem that at this period there was no need for a rule against perpetuities, see Gray, Perpetuities §§ 123, 134.

[4] It is clear from Manning and Andrew's case (1576) 1 Leo. 256 that settlements, which would later have been held void as creating a perpetuity, were, in at least one instance, attempted; in that case a feoffment was made to the uses of the feoffor's will in 1509, and in 1517 the feoffor made a settlement by his will to the use of his wife for life, then to the use of his son and his son's wife for life, then to the next heir of the body of his son for life, then to the heir of that heir for life, then to the use of the heirs of the body of the son for the life or lives of every such heir, with a final remainder to the right heirs of the son; the Statute of Uses saved the rights of persons other than the rights of the feoffees whose seisin was divested by the statute, 27 Henry VIII. c. 10 § ii (2), and cf. Plowden 115 *note*; these limitations therefore were not affected by the rules laid down by the common law for uses executed by the statute; the way in which the case was argued seems to suggest that, as before the Statute of Uses these limitations were valid, and as they were made before the Statute, they must be still regarded as valid, see L.Q.R. xv 73 and n. 4; xxix 308, 313, and Sugden, Powers (6th Ed.) 17 there cited; for the later law see Pt. II. c. 1 § 6.

enabled them also to get rid of the common law rules as to the forms which their dispositions must take. Though the use, regarded from the point of view of the actual powers over the land exercised by the cestuique use through the feoffees to uses, might be regarded as equitable ownership,[1] from the point of view of conveyancing it was an equitable right to compel the feoffees to act as directed by the feoffor or the cestuique use. From this point of view, therefore, it was merely an equitable chose in action.[2] Equity, therefore, could make what rules it pleased as to modes of transfer;[3] and, as we have seen, it used its power to release the cestuique use from all requirements of form. Thus on all sides, the restrictions of the common law upon dealings with land were relaxed; and effect was thereby given to the tendency, which had been increasing in strength all through the Middle Ages,[4] to regard land simply as a species of property, and, consequently, to give to landowners powers of disposition over it as full as those which they enjoyed over any other kind of property.

These incidents of the estate of the cestuique use had been developed by means of a series of decisions upon the question whether the feoffor or the cestuique use was entitled, by means of a writ of subpœna, to compel the feoffees or other persons whose consciences were affected by the use, to employ their legal powers in the manner directed by him. The chancellor, therefore, had concentrated his attention upon the rights and powers of the cestuique use. The question of his duties and liabilities, except in so far as he owed duties to the feoffee,[5] never arose in these cases. The legal duties and liabilities were annexed to the legal ownership; and, as the cestuique use had no legal ownership, he was not subject to any of them. No doubt in some cases the public opinion of the fifteenth century saw no great harm in some of the effects of this freedom from legal liability. Such incidents of tenure as wardship and marriage were burdensome anachronisms. The wife's right to dower and the husband's right to curtesy could be sufficiently provided for by the new power to make wills of lands, and by the improved forms of marriage settlement which the use had rendered possible.[6] But

[1] Above 433-437.

[2] Co. Litt. 272b; Fourth Instit. 85.

[3] As Bacon picturesquely put it, Reading 420, "Conveyances in uses were like privileged places or liberties; for as there the law doth not run, so upon such conveyances the law could take no hold."

[4] Vol. iii 73.

[5] Above 431.

[6] As was said by Shelley in Abbot of Bury v. Bokenham (1535) Dyer at p. 11b, "Though he did not request the feoffees to make the feoffment (which gave a jointure to his wife), still the feoffees did no more than they ought to do, for a man ought, in common decency (per la ley de honesty), to provide a jointure for his wife out of his land, when she is excluded from dower."

in other cases more serious results ensued. The claims of creditors could be evaded, purchasers could be defrauded, maintenance was encouraged, and the law against conveyances in mortmain could be made a dead letter. Very soon after the protection of the chancellor converted the estate of the cestuiqui use into a form of property, these results began to appear. It therefore became necessary for the legislature to intervene in the interests of honest dealing and public policy. Hence, long before the Statute of Uses, the development by the chancellor of the equitable interest of the cestuique use was controlled and modified by the legislature. With the effects of this legislative action we must now deal.

(iii) *The control of the use by the legislature.*

The purposes which the use as thus developed by the court of Chancery could be made to serve may be grouped under three heads:—(*a*) there were purposes to which there was no legal objection; (*b*) there were purposes which were either illegal or clearly contrary to public policy; and (*c*) there were purposes which were not clearly legal or illegal, nor, in the opinion of the majority of Englishmen, contrary to public policy.

(*a*) There were many purposes to which uses were put which were open to no legal objection; and, with the carrying out of these purposes, the legislature in no way interfered till 1535. Instances are the more flexible modes of conveyance, the larger control over property thereby secured, and the power to devise. These new powers which the use conferred upon landowners harmonized with the new conception of the nature of land ownership which had come with the passing of feudal ideas.[1]

(*b*) There were many purposes which were either illegal or clearly contrary to public policy. It was with the object of frustrating these purposes that the legislature interfered from a very early period in the history of the use. Firstly, it had interfered as early as 1377 to prevent the conveyances to uses of land or goods for the purpose of defrauding creditors.[2] Further provisions against such frauds were made in 1379, 1488, and 1504.[3] Secondly, it had interfered as early as 1392 to prevent

[1] Above 442; below 446.

[2] 50 Edward III. c. 6. An earlier Irish Act against Fraudulent Conveyances was passed in 1310 (3 Edward II. c. 4) to deal with the case where A enfeoffed B of his land with intent "to enter into rebellion or to commit any other felony," see Sanders, Uses (5th Ed.) i 12 n.; but this would seem to refer to feoffments made on a common law condition and not to uses.

[3] 2 Richard II. st. 2 c. 3; 3 Henry VII. c. 5; 19 Henry VII. c. 15; Bacon, Reading 414, points out that by the last-mentioned statute relief was given, "to the creditors upon matter of record, as upon recognisance, statute, or judgment, whereof the two former were not aided at all by any statute, and the last was aided by the statute . . . only in cases of sanctuary men."

the evasion of the statute of mortmain.[1] This statute in terms applied not only to gifts to corporations, but also to gifts to gilds and fraternities.[2] But apparently it was not effectual to stop gifts to chantry priests and other unincorporate bodies. The statute of 1530 prohibited such gifts, either for obits and the perpetual service of priests, or to churches, chapels, or gilds "erected or made of devotion" without corporation, for a longer period than twenty years, on the ground that such gifts were as injurious to the state as gifts in mortmain.[3] Thirdly, the legislature interfered to prevent feoffments to great lords by disseisors or persons whose titles were contested, in order that these lords might maintain the titles of these feoffors.[4] Fourthly, it interfered to prevent the enfeoffing by lessees for life or years of many feoffees, whereby reversioners were impeded in taking proceedings for waste;[5] and, by a later statute, demandants in a writ of formedon were allowed to proceed against the pernor of profits, i.e. the cestuique use, and were not to be driven to sue feoffees, of whose existence they were very probably unaware.[6]

Bacon points out that "in all this course of statutes no relief is given to purchasers that come in by the party (i.e. by the cestuique use), but to such as come in by law: as . . . creditors, disseisees, or lessors, and lords (and that only in case of mortmain.")[7] But, as the equitable ownership of the cestuique use came to be more distinctly recognized, it gradually became more frequent for him to attempt to dispose of interests in the property; and, as he had no power at all to do so at law, confiding purchasers found themselves ejected by the feoffees. It was to remedy the insecurity of the titles of purchasers from the cestuique use, and of others who had acquired interests in the land from these purchasers, that, in 1483[8] a statute was at length passed

[1] 15 Richard II. c. 5.

[2] "And that the same statute extend and be observed of all lands, tenements, fees, advowsons, and other possessions purchased or to be purchased to the use of Gilds or Fraternities."

[3] 23 Henry VIII. c. 10. Maitland, Collected Papers iii 395, 396, thinks that the Act intended "utterly to suppress" all trusts made in favour of unincorporate bodies; and that it was due to a restrictive interpretation that its operation was confined to superstitious trusts—"perhaps the members of Inns of Court were not quite impartial expositors of the King's intentions;" but the words in the Act, "erected or made of devotion" would seem to justify the view which the judges took in Porter's Case (1592) 1 Co. Rep. at p. 24b; the terms of Richard II.'s statute, above n. 2, really appear to be wider.

[4] 1 Richard II. c. 9; 4 Henry IV. c. 7; 11 Henry VI. c. 3.

[5] Ibid c. 5. [6] 1 Henry VII. c. 1. [7] Reading 413.

[8] 1 Richard III. c. 1; it is interesting to note that another statute of the same year, 1 Richard III. c. 5, passed to protect the interests of those to whose use Richard III. was solely seised before he became king, foreshadows the remedy applied by Henry VIII.'s Statute of Uses (below 461); its operative words run as follows: "Be it ordeyned . . . that suche possession, right, title, and interesse of and in any londes . . . whereof the king is sole seiased by reason of any feoffement or estate

"for the relief of those that come in by the party."[1] It enacted that the cestuique use should have the power to make dispositions of the land which should hold good as against the cestuique use who made them, as against his heirs, and as against all persons who had title or interest only to his use at the time when the disposition was made.[2]

This statute is historically interesting for several reasons. In the first place, the idea of giving legal powers to the cestuique use foreshadows the governing idea of the Statute of Uses. In the second place, the preamble to this statute[3] shows that, half a century before the passing of the Statute of Uses, some of the evils which the latter statute was designed to remedy were very real things; and this fact will, as we shall see, throw some light upon the history of the events which led to the enactment of that statute.[4] In the third place, the defects of this statute were of considerable help to the framers of the later and more efficient statute.

Its first and greatest defect was that, though it gave power to the cestuique use to dispose of the land, it left the powers of the feoffees to make similar dispositions untouched.[5] The result was that titles were more uncertain after the statute than before. Its second defect was that, though the dispositions of the cestuique use were good as against the feoffees who held *only* to his use, they were not good as against the feoffees when they held also to the use of others. Thus they were not good as against feoffees who held, after the determination of a cestuique use's estate tail, to the use of remaindermen or reversioners.[6] Its third defect was that it was only a cestuique use in possession who could take advantage of its provisions.

The two latter defects were illustrated by the case of *Delamere*

made afore he was king, to the use of any other persone . . . veste and be in suche persone . . . to whose use he is so thereof seased."

[1] Bacon, Reading 413.

[2] As Bacon points out, Reading 414, "Cestuique use was *obiter* enabled to change his feoffees, because there were no words in the statute of feoffments, grants etc., upon good consideration, but generally;" but the powers conferred on the cestuique use were not very extensive, see Sanders, Uses (5th Ed.) i 65.

[3] "Forasmoche as by privey and unknowen feoffements greate unsuertie trouble costes and grevous vexacions dailly growen among the King's Subgiettis, insomoche that no man that bieth eny landes tenements rents and services or other inheritaments, nor women that have joyntoure or dower in any landes, tenements or other inheritaments, nor mennys last Willes to be perfourmed, nor leses [for] time of lyff or of yeres, nor annuities graunted to eny personne or persones for their service [for] tyme of their lyfe or otherwise, be in profit suerte nor without greate trouble and dowte of the same by cause of the seid privey and unknowen feoffaments: for remedy wherof," etc.

[4] Below 450-461.

[5] Chudleigh's Case (1589-1595) 1 Co. Rep. at pp. 132a and b, where this statute and the Statute of Uses are, from this point of view, contrasted.

[6] Y.B. 19 Hy. VIII. Trin. pl. 11.

v. *Bernard*,[1] the facts of which are as follows: A and B his wife were cestuique use in special tail, remainder to A in general tail, remainder to C in fee. A enfeoffed D in fee simple, who enfeoffed E, who enfeoffed C, who enfeoffed the defendant. After the death of A, it was held that the feoffees could re-enter on behalf of B. The feoffees did not hold *only* to the use of A;[2] and the feoffment of C was not operative because he only had a use in remainder.[3]

(*c*) The purposes not clearly legal or illegal, and not obviously contrary to public policy, were the evasion of such incidents of tenure as wardship, marriage, relief, primer seisin, fines for alienation, and escheats whether *propter defectum sanguinis* or *propter delictum tenentis*.[4] The simple device of enfeoffing several persons as joint tenants to the use of the feoffor afforded a complete protection against all these incidents. In fact, just as the existence of these incidents of tenure had had much to do with shaping the course of Edward I.'s legislation upon the land law,[5] so they had much to do with the popularity of uses at this period. We shall see, too, that they were the principal cause for Henry VIII.'s legislation upon uses;[6] and that they had no slight effect in determining the manner in which the Statute of Uses was interpreted at different periods.[7] Thus in different ways and at different periods in the land law they have, during the whole period of their existence, exercised a very powerful effect upon its development.

Naturally the view which was taken of this evasion of legal liability by the contemporary law and public opinion was affected by the nature of these incidents. Now it cannot be denied that, long before the fifteenth century, any meaning that these incidents of tenure had once possessed had departed. They were merely pecuniary exactions profitable to king or other lord entitled, and very burdensome to the tenant. Both king and lords lost by their evasion. But, while the lords on the whole gained, because, though lords in respect of some parts of their possessions they were tenants in respect of others, the king always lost. He alone was always lord and never tenant.

To the mediæval king who must not only live of his own, but also pay the expenses of the government of the state from the same source, this evasion of the incidents of tenure was a serious matter.

[1] (1568) Plowden 348; cp. Sanders, Uses (5th Ed.) i 25-26.

[2] Plowden at p. 351.

[3] "Nor was it intended (by this statute) that the acts of them in remainder or reversion, before the particular estates determined, should hurt the particular uses, or the state of the feoffees seised to particular uses, but that they might enter to revive the first uses," ibid at p. 352.

[4] For these incidents see vol. iii 54-73.

[5] Vol. ii 348-349.

[6] Below 450, 464-467.

[7] Below 468-473; vol. v 307-309.

The revenue of the state was gravely diminished. But the evasion of laws which impose pecuniary burdens on the subject has never appeared quite in the same light as the evasion of laws which impose penalties for practices which are clearly immoral, or directly injurious to the state—a feeling to which Lord Mansfield gave expression when he said that "one nation does not take notice of the revenue laws of another."[1] And, if these laws are clearly unjust, the strength of the feeling that no great harm will be done if they can be evaded, will very much increase. It was thought then, as it is thought to-day, that if an owner of property can so deal with it that it escapes the incidence of the tax, so much the better for him. No law prevents him from doing this. No law prevents a skilled lawyer from pointing out means and ways by which this can be done.[2] And when these dealings take the form of settlements which are made to fulfil the obvious moral duties of securing the future of a man's widow, or children, or other relatives or dependants, his acts may be regarded as not only permissible, but even meritorious.[3] In the same year that the Statute of Uses was passed, the crown tried to prove that certain feoffments to uses, made by Lord Dacres, were covinous, because they defrauded the king of his rights of wardship and marriage; and that therefore his devise of lands thus settled was void. To this argument Montague C.J. refused to listen.[4] He said that the mere making of a will could not be said to be fraudulent; and that in the will itself no fraud could be found. It contained directions that a manor should be given to his youngest son, and that money

[1] Planche v. Fletcher (1779) 1 Dougl. at p. 253.

[2] "There are two ways of construing the term 'evade': one is that a person may go to a solicitor and ask him how to keep out of an Act of Parliament—how to do something which does not bring him within the scope of it. That is evading in one sense, but there is nothing illegal in it. The other is when he goes to his solicitor and says, 'Tell me how to escape from the consequences of an Act of Parliament although I am brought within it,' that is an act of quite a different character," Bullivant v. Attorney-General for Victoria [1901] A.C. at p. 207 *per* Lord Lindley.

[3] Lord Macnaghten, in the case of Attorney-General v. Duke of Richmond and Gordon [1909] A.C. at p. 473, said, with reference to the argument that a disposition of property was merely a colourable pretence to evade estate duty, that on such a construction, "A man who burdens his property to portion his daughter, to educate or advance his son, to save a friend from ruin . . . or to promote some benevolent object . . . cannot hope for an allowance from the Commissioners of Inland Revenue. That concession is reserved for a man who spends on himself alone, for the prodigal, the gambler, and such like. . . . The words of the enactment are satisfied if the direct and immediate purpose of the person incurring the debt or creating the incumbrance is to make himself master of a sum of money over which he alone has power of disposition; and it was not intended that there should be any inquiry into the ulterior and more remote purposes of the transaction."

[4] Y.B. 27 Hy. VIII. Pasch. pl. 22 (pp. 9, 10), "Nul covin peut estre dit in cest volonte: car le seigneur Dacres veut que les feoffees seront seisis al use d'un A son fitz in tail, le remainder oultre in fee, ce qui ne peut estre dit covin. . . . Et auxi il ad done un manoir a son fitz puisne, et declare certeins deniers d'estre levy de ses terres pur le marriage d'un de ses cousins, et pur le paiement de ses dettes, qui prouvent que volonte ne fuit fait per covin a defrauder le Seigneur de la gard."

should be raised out of his lands for the marriage of one of his cousins, and for the payment of his debts; and from such provisions no intention to defraud the king could be inferred. To hold otherwise would be to throw into confusion all the settlements in the kingdom.[1] The substantial similarity of this reasoning to that which had been made use of by the House of Lords in the construction of modern Finance Acts is striking.

The machinery of the use, then, was an effectual means of evading a whole series of burdensome exactions. And, as Maitland has pointed out, this was probably the reason why the law courts persisted in shutting their eyes to its existence. "If they had allowed cestuique use any sort of right the whole scheme might have broken down. A great question of policy would be opened—if wills of land are to be made then the king should be compensated."[2] Moreover, in the fifteenth century, the king was hardly in a position to make such claims. The government was, as we have seen, run by and in the interests of the great nobility:[3] and they were the class who had most to gain by the suppression of such a question as this. Though, therefore, the fact that feoffments to uses were depleting the value of the incidents of tenure had been noticed in Parliament at the very beginning of the fifteenth century,[4] it was not till the strength of the monarchy had been restored by Henry VII. that the legislature took up this question.

A statute of 1489[5] provided that, where the cestuique use of lands held by knight service died intestate, his heir, if an infant, should be in ward,[6] and that, if of full age, he should pay a relief. It was a tentative and a timid statute. It only applied to cases of intestacy, which the statute itself would be likely to make increasingly rare; and it began with a preamble in which the legislature attempted to disguise the new departure it was making, by a reference to a clause in the statute of Marlborough designed to prevent fraudulent feoffments made with the purpose of evading the incidents of wardship and marriage. The preamble probably deceived no one: but it gave currency to some curious and baseless historical speculations by contemporary lawyers[7] as to the

[1] "Et si fuit nul raison prouvant ce, in le Civil Ley est dit, *communis error facit jus*. Et sera grand mischief de changer la Ley a or; car moults inheritances de Realm, dependant a ce jour in uses, issint que il sera grand confusion si ce sera fait."

[2] Equity 32. [3] Vol. i 483-485, 491; vol. ii 414-418.

[4] R.P. iii 558 (6 Hy. IV. no 63) evasion of the incidents of wardship and marriage; ibid 445 (1 Hy. IV. no. 159)—evasions of the incidents of escheat and forfeiture.

[5] 4 Henry VII. c. 17.

[6] As Coke points out, Co. Litt. 76b, if there was a single feoffee to uses who died leaving an infant heir, there might be a double wardship "for one and the same land, the one by the statute 4 Hy. VII., the other by the common law."

[7] Y.B. 27 Hy. VIII. Pasch. pl. 22 (p. 8); cp. Bacon, Reading 411; vol. ii 594-595; it was one of the reasons put forward for the argument that, uses being at common

antiquity of the system of feoffment to the uses with which the fifteenth century was familiar.[1] A statute of 1504[2] (which deals also, as we have seen, with frauds on creditors)[3] took up the question of the rights of the lords of land held to the use of their socage tenants, and of lands held to the use of their villeins. If land was held to the use of their socage tenants the lord was to be entitled to heriots and reliefs; if land was held to the use of their villeins the lord was to be entitled to seize the land.

Neither of these statutes really went to the root of the question. The most burdensome of the incidents of tenure and the most valuable to the crown were the rights of escheat and forfeiture, and the rights of wardship and marriage. The evasion of the first two incidents was not touched; and, as we have seen, the evasion of the two latter was only stopped when the tenant died intestate. But it would have been impossible to do more. As we shall now see, the history of the passing of the Statute of Uses and the political consequences which followed its enactment, show clearly that Henry VII. could not have effected a thorough-going reform, upon a matter which touched so nearly the pecuniary interests of the most powerful class in the country, without risking a throne which was none too secure.

(2) The Statute of Uses.[4]

Without a considerable knowledge of the legal history of the sixteenth and early seventeenth centuries we cannot understand the real meaning of the Statute of Uses; and in consequence of the absence of this knowledge no statute has been more misunderstood. The causes for its enactment, the objects of its framers, the extent to which those objects were attained, and the far-reaching and permanent effects, direct and indirect, which it has had on all branches of the law of property, have been from time to time most diversely, and, generally, most inaccurately estimated. Because at later periods in the history of the law some of the objects of the statute were frustrated, either by the new developments of equitable doctrine which were called for by altered legal and social conditions, or by the ingenuity of conveyancers, its effects have been sometimes unduly minimized. The student is told almost in one breath that the only effect of the statute was to add three words to a conveyance, and that it is the foundation of the modern system of conveyancing. We can only

law, they should be assimilated in all respects to the legal estate, and that they were therefore not devisable, above 438.

[1] As we have seen, above 417-418, the antiquity of the idea of one man holding to the use or on account of another is one thing; the antiquity of the use as developed by the court of Chancery in England is quite another.

[2] 19 Henry VII. c. 15.

[3] Above 443 n. 3.

[4] 27 Henry VIII. c. 10.

avoid these paradoxes if we look at the matter historically and examine (i) the political causes which shaped the Statute of Uses; (ii) the provisions of the Statute and its immediate consequences; and (iii) the extent to which the framers of the Statute succeeded in attaining the objects with which it was framed.

(i) *The political causes which shaped the Statute of Uses.*

Some years before the passing of the Statute of Uses fiscal necessities had led Henry VIII. to reflect upon the depletion of his feudal revenue. Loans and benevolences meant the complete loss of a personal popularity, which the divorce proceedings and the threatened legislation against the church were beginning to imperil. Though he was able, partly by persuasion and partly by diplomatic pressure, to induce Parliament to further his ecclesiastical policy and his matrimonial schemes, he could not induce it to vote him a permanently adequate supply. Under these circumstances the restoration of his feudal revenue, which after all was his own property, appeared to Henry's legal mind as the most promising source from which a permanent increase in the royal revenue might be drawn.[1]

Henry's attention, therefore, was directed to the land law; and in the land law he could not but see much that displeased him; for it was at once the most highly developed and in some respects the most irrational part of the common law.[2] He did not hesitate to propose to make in it changes of the same drastic character as those which he was making in other branches of the law.

In 1529 two measures were drawn up to be submitted to Parliament.

The first[3] was a draft bill which, if it had been carried, would have at once revolutionized and simplified the law. It began by reciting the "grate trobull, vexacion, and unquietness amonges the kynges suggettes . . . for tytyll of londes, tenements, and other heriditamentes . . . as well by intayle as by uses and forgyng of false evidence." It went on to provide the following drastic remedies: (1) All entails were to be abolished and none were to be permitted for the future, "so that all manner of possessions be in state of fee simple from this day forward for ever."[4]

[1] That the desire to increase the royal revenue was the real cause of Henry VIII.'s legislation on the subject of uses was clearly explained by Harper J. in Brent's Case (1583) 2 Leo. at pp. 16, 17; his exposition comes nearer to the historical truth than any other of the contemporary speculations on the subject; this, the real reason for the passing of the statute, was also emphasized by Lord St. Leonards, Sugden, Powers (8th Ed.) 7.

[2] Vol. ii 590-591.

[3] Letters and Papers, Henry VIII. vol. lvi ff. 36-39, calendared Letters and Papers, Henry VIII. iv no. 6043 (b); printed App. III. (1).

[4] App. III. (1) § 2.

(2) No uses of any land were to be valid, "onles the same use be recordid in the kynges courte of the commen place."[1] A special officer of the court was to be deputed to keep a separate roll for each shire, and he was to charge certain fees for keeping the roll.[2] (3) To avoid the risk of forgery, all purchasers were required, so soon as the deed of conveyance was sealed and livery of seisin made, to have the deed openly read in the parish church or churches. where the land was situate, "att suche tyme as moste people be present." The priest was to "fyrme the said deede;" and it was to be registered "in the schere towne in which the land lay."[3] (4) All lands of which recoveries had already been suffered or fines levied were, after the lapse of five years, to be held in fee simple by those in whose favour the recovery had been suffered or the fine levied;[4] and all seised of lands of which they or their ancestors had been peaceably seised for forty years without claim made were to have an indefeasible title.[5] (5) Entails were still to be permitted "to the nobyll men off thys realme being within the degree of a baron;" and no one was to buy such noblemen's land without the king's licence.[6] If such licence were given, the deed must comply with the formalities required for ordinary conveyances, and the purchaser was to hold in fee simple.[7]

This measure proposed so give considerable privileges to the nobility. In return the nobility were prepared to concede something to the king. Their concessions form the second of these two measures. They are contained in twenty-three elaborate articles which, having been agreed upon by the king and the nobility, were to be laid before Parliament for its sanction.[8]

Under these articles the king was to have the wardship of the lands of all his tenants holding of him for an estate of inheritance by knight service in chief and leaving an infant heir (excepting only the fees of the Archbishop of Canterbury and the Bishop of Durham between Tyne and Tees), whether the tenant had the use or the legal estate.[9] If the land was devised or otherwise settled, the king was to have the wardship of a third (notwithstanding such devise or settlement) from the lands so devised or otherwise settled;[10] but with a saving for the rights of tenants under existing settlements.[11] If part was devised or otherwise settled, and part not, the king was to elect whether he would take the part not devised or settled, or whether he would take the third.[12] If the land

[1] App. III. (1) § 3. [2] Ibid § 3. [3] Ibid § 4.
[4] Ibid § 7. [5] Ibid § 8. [6] Ibid § 5.
[7] Ibid §§ 5 and 6; the latter section seems to be designed to make it clear that these lands are from henceforth to be held in fee simple.
[8] Cotton MSS. Titus B. 4, ff. 114 (125)-118 (125), calendared L. and P. Henry VIII. iv No. 6044; they are printed in App. III. (2).
[9] Ibid Articles 1, 2, 20. [10] Ibid Articles 3 and 20.
[11] Ibid Article 21. [12] Ibid Article 4.

held of the king by knight service in chief did not amount to a third of all the tenant's lands, and he devised or otherwise settled all his other lands, the king was to have the wardship of the lands held in chief and of so much of the other lands as would amount to a third of all his lands.[1] Any estate coming to the ward from his ancestor who held of the king, by reason of the expiration of a particular estate, was to be held by the king, unless otherwise settled.[2] The same rules were to apply to lands held of the king by reason of any escheat, honour, or otherwise, and not in chief.[3] On suing out livery the king was to be entitled to a whole year's profits of a third of the land;[4] and specific rules were made as to the time for suing out livery of estates in possession and reversion.[5] Heirs of full age were to pay half a year's profits as before.[6] It was provided that recoveries to secure jointures or settlements of the land were to be permitted as before, and should have the same effect.[7] Mesne lords were to have the same advantages as the king;[8] and these rules were to apply to *Gard pur cause de gard.*[9] Neither the king nor any other lord was to have any right of marriage in respect of persons ("being of the full age of consent") married in the ancestor's life.[10]

It was provided that no tenant in chief should make any gift in tail, or to any other use, or do any other thing whereby the king should be excluded from any profit of ward, primer seisin, or livery contrary to the effect of this agreement; and that "if any other imaginacion or invencion hereafter shall be found contrived or devised contrarie to the same, yet that, or any such thinge nothwithstandinge, the kinge's heighnes, his heirs and successors, shall have the full benefitte and effect of his wardship of the bodyes and landes, and of primier seisons, and liveries accordinge to the plaine and true intent of the said Articles and every of them."[11] Conversely it was provided that, "if at any time hereafter imaginacion devise or invencion shall be found or contrived for the kinge's heighness . . . whereby it shall be pretended that any larger or more profitts or advantages concerninge his . . . wardships, primier seasons, or liveries should or might grow to the kinge's heighnes . . . than by the plaine or true

[1] App. III. (2) Article 5. [2] Ibid Article 6. [3] Ibid Article 7.

[4] Ibid Article 8; under the existing rule the king took half a year's profits of all the land.

[5] Ibid Articles 8-13, 23. [6] Ibid Article 12.

[7] Ibid Articles 16 and 17. [8] Ibid Article 19.

[9] Ibid Article 22; *gard pur cause de gard* arises where there is lord, mesne, and tenant, and the mesne is in ward to the lord, and the tenant dies leaving an infant heir—in that case the infant heir is in ward of the lord *pur cause de gard*, see 43 Ass. pl. 15; Plowden 334; Rolle, Ab. *tit.* Garde B. 20, 25.

[10] Ibid Article 22.

[11] Ibid Article 14; for the manner in which a gift in tail might defeat wardship, see Bingham's Case, 2 Co. Rep. (1598-1600) at pp. 91 b, 92 a.

meaninge declared by the Articles above written is limited or appointed, yet, that notwithstandinge, the kinge's heighnes is contented that it shall be enacted that his Grace . . . shalbe pleased to accept and take the benefitts and profitts before limited by the said Articles and none other more or larger."[1]

In the event of the death of any of the signatories of these articles before they were enacted by Parliament, the articles were to be binding upon their heirs.[2]

Henry might make a bargain with his nobility; but it was quite another matter to induce the House of Commons to ratify it. The large landowners, under the degree of barons, saw themselves deprived of the power of making secure family settlements and secret conveyances. The lawyers saw themselves deprived of a large amount of profitable business. It is not surprising therefore that measures which roused the hostility of the two most powerful interests in the House of Commons came to nothing.[3]

But the need for money was pressing; and Henry was determined. In the Parliament of 1532 he was again pressing his proposals. But apparently he only succeeded in arousing a more determined opposition; for Chapuys relates that the royal demands "had been the occasion of strange words against the king and council."[4] It was clearly impossible to carry the original scheme through the House of Commons. The alliance between the king and his nobility had been found to be useless for this purpose. There must be a new scheme founded on a new alliance between the king and one of the interests in the House of Commons which had blocked the original scheme.

There could be little doubt which of these interests it would be the most easy to win. It was not likely that the landowners would ever consent to any scheme which would deprive them of the power of making secure family settlements and secret conveyances. On the other hand, the lawyers, and probably other classes in the community, were prepared to admit that uses often furthered fraudulent dealing. Both the preamble to a statute of Richard III.'s reign,[5]

[1] App. III. (2) Article 15. [2] Ibid Article 18.

[3] For the large influence which the lawyers had in the House of Commons see vol. ii 430-434; above 97, 174, 189.

[4] L. and P. v no. 805. Chapuys relates that the king was trying to get from Parliament a third of the feudal property of deceased persons, but that he had not succeeded, and that the demand had been the occasion of strange words against the king and council; ibid no. 762, he relates that the question whether the king should have the goods of all lords who die, even when they leave a son of full age, had been discussed in Parliament; ibid no. 989, he says, "the king has again referred to Parliament the rights he wishes to have on inheritances, but Parliament will not agree to it."

[5] 1 Richard III. c. 1; above 445 n. 3.

and "The Replication of a Serjeant to the Doctor and Student,"[1] show that this feeling existed.[2] Probably the perception of the common lawyers was quickened by their professional jealousy of the Chancery. Many of them no doubt would have liked to capture for their own courts jurisdiction over this new form of property, which was making the fortune of the court of Chancery; and the new theory, which at this time was beginning to make its appearance in the law courts, that uses were known to and recognized by the common law[3] is perhaps evidence of this desire—"The wish was father to the thought." Clearly there was a possibility of drawing a measure which would both give the king what he wanted and command the approval of the lawyers.

The way in which the king went to work was characteristic of his diplomatic methods. He frightened the landowners by the stringency of his inquiries into settlements which deprived him of his rights;[4] and he frightened the lawyers by listening to a petition against abuses in the administration of the law.[5] This petition was addressed to the king and the lords spiritual and temporal because "soo many lerned men [*i.e.*, lawyers] byn rulers in your commen house ayenst whome noo man ther dar ne may make eason [*sic*] in any cause ayenst their advayles or profetts." It complained of the delays in the law, and the quibbles raised by the lawyers for the defence of untrue titles; the heavy fees which they demanded;[6] the difficulty in getting judgments executed

[1] Hargrave, Law Tracts 323-331; the full title is, "A Replication of a Serjaunte at the Lawes of England to certaine Pointes alleaged by a Student of the said Lawes of England in a Dialogue in Englishe between a Doctor of Divinitye and the said Student;" for this tract see vol. v 269.

[2] "They [uses] began of an untrue and crafte invention to put the king and his subjects from that which they ought to have of righte by the good true common lawe of the realme; as the kinge's highnes from his escheats, his wardes, and his primer seasins . . . and his subjects from their escheats and wardes, women from their dowers, and husbandes of such women that be inheritours from their tenures by the curtesie of England . . . And those that have good right and tytle to any land to recover it by action after the course of the common lawe be put from their actions. . . . By soche uses the good common lawe of the realme . . . is subverted and made as voyde, so that none of the saide subjects can be and stand in anie surety of any possession," ibid 328, 329; cp. the remarks made by Lord Ellesmere upon the frauds rendered possible by Henry VIII.'s Statute of Wills cited below 472 n. 6, which agree with the views expressed in the preamble to the Statute of Uses.

[3] Vol. ii 594-595; for the conclusion sometimes drawn that the incidents of the estate of the *cestuique use* should follow closely all the incidents of the legal estate see above 438, 448 n. 7.

[4] See L. and P. vii no. 383 (1534); Cromwell writes to the sheriff of Yorkshire that, being informed of the death of Sir J. Denham, who held lands *in capite* of the king, the Council think that, in order to prevent the king's rights from being cloaked, the persons to inquire for the king should be resident near the lands; the names of suitable persons are enclosed; the case reported Y.B. 27 Henry VIII. Pasch. pl. 22, above 447, affords another illustration.

[5] State Papers, Henry VIII. Q. f. 138 (31), calendared L. and P. Henry VIII. vii no. 1611 (3) (1534).

[6] "Nother sergeauntes nor apprenticis woll for the preferment of theyr clyauntes cause goo . . . barre at any tyme afor your Justices without the fee of iijs. iiijd. to

owing to the bribery of undersheriffs, and the misconduct of attorneys and juries. It pointed out that, in consequence, persons were compelled "for veary poverte to sue to your grace by petition whereby your grace and counsaill are molested and troubled." It prayed, in conclusion, that statutes should be enacted to expedite causes, and to fix the fees of counsel, attorneys, and sheriffs. As usual Henry's diplomacy was successful.

In 1535-1536, two years after the presentation of the petition against abuses in the administration of the law, a list of grievances suffered by the realm from uses,[1] three draft bills concerning uses and wills,[2] and one draft bill concerning the enrolment of covenants, contracts, bargains, or agreements made with reference to the uses of lands,[3] were before Parliament. It was from this material that the Statute of Uses, and the statute supplemental to it, concerning enrolments of bargains and sales, finally emerged.[4]

The list of grievances suffered by the realm from uses is long and detailed. It is written in two hands and there is a certain amount of repetition.[5] In some cases it gives particular instances of inconveniences suffered;[6] and at the end there is a summary statement of the various fraudulent purposes which uses had been made to serve.[7] The writers insist much on the disadvantages of uses from the point of view of the cestuique use, of the public at large, of the king and lords, and of the law. The cestuique use is at the mercy of a fraudulent bailiff or feoffee; nor can he take action against a trespasser. He loses his curtesy, and his wife her dower. The king loses his forfeitures, and king and lords lose their incidents

theym be gevyn for . . . every tyme soo goyng, whiche in sundry termes consideryng the manyfold dilayes nowe used. . . . Thurre undoyng and distruccion of a poore man;" the manuscript is defective, but the sense is plain; the records contained in Plowden's or Coke's Reports, which set out the numerous adjournments from term to term, bear out the justice of this complaint.

[1] L. and P. Henry VIII. vol. ci f. 282, calendared L. and P. Henry VIII. x no. 246 (3), printed App. III. (3).

[2] L. and P. Henry VIII. vol. ci ff. 252, 261 *et seq.*, 286, calendared L. and P. Henry VIII. x nos. 246 (i), (2), (4). The draft bill in L. and P. f. 286, calendared L. and P. x no. 246 (4), is printed App. III. (4).

[3] L. and P. Henry VIII. vol. ci f. 303, calendared L. and P. Henry VIII. x no. 246 (6), printed App. III. (5).

[4] It will be seen from the Appendix that the draft bill is far more elaborate than the Statute of Enrolments actually passed—27 Henry VIII. c. 16. But it is quite clear that both the draft bill and the actual statute were integral parts of Henry's scheme for dealing with uses. The Statute of Enrolments was certainly not, as is sometimes stated (e.g. Jenks, Short History of English Law 121), a statute passed in a hurry to supply an unforeseen defect in the Statute of Uses. It is really, as Bacon pointed out in his Reading on the Statute of Uses at p. 432, a proviso to the Statute of Uses—"Foreseeing that the execution of uses would make frank-tenement pass by contracts parol, they made an ordinance for enrolments of bargains and sales . . . but without any preamble, as may appear, being but a proviso to this statute."

[5] App. III. (3), §§ 1 and 34, 3 and 12, 5 and 35.

[6] Ibid §§ 6, 10, 11, 18, 19, 22, 30, 31.

[7] Ibid §§ 38-43.

of tenure. The public at large is defrauded because no man can tell against whom to bring his action, nor is anyone secure in his purchase. The law is wholly uncertain—"the openyons of the Justices do chaunge dely apon the suertyez for landes in use."[1] The use is, "but the shadowe of the thyng and not the thyng indeyd."[2] It causes the law to be double, and to sever the real from the apparent ownership, "which is a grett disseytt."[3] "Where per case some one man takyth esyngler welth their be a hundrioth against one that takyth hurt and losse theirby, is yt a good law?"[4] the writer asks. He thinks it would be a good thing if uses were "clene put out the lawe."[5] The document is an able statement of the case against uses; and it may well have been the raw material upon which those who drew the preamble to the statute worked.

The three draft bills concerning uses and wills present two different schemes for dealing with the problem of the use—there is a less thoroughgoing scheme which was not followed, and there is the more complete scheme which was followed.

The less thoroughgoing scheme[6] begins with a short general preamble to the effect that by means of uses "the good old lawes of the realme be nygh subverted;" and then goes on to subject the equitable interest to the liabilities of the legal estate for certain purposes, and to limit the modes in which uses can arise. Thus the estate of the cestuique use is made liable to forfeiture on attainder, to curtesy, to his ancestors' specialty debts to which the heirs were bound, and to the incidents of tenure.[7] Recoveries, fines, feoffments, releases, and confirmations by cestuique use were to have the same effect as if cestuique use had had the legal estate.[8] For the future no uses were to have any legal effect except those clearly expressed at the time of conveyance; and a recovery was not to be suffered to any other use but to that of the recoveror.[9] No bargain, contract, covenant, or agreement with reference to land was to change the use of the land.[10] Those injured by the breach of such contracts were confined to their remedies for breach of contract.[6] Then comes a clause, the effect of which would have been somewhat revolutionary, as it would, apparently, have prevented a recovery from affecting the interests of remaindermen and reversioners without their own consent.[11]

This scheme would no doubt have put an end to some of the most crying evils produced by uses. But it would have effected this object by subjecting the use to many of the rules of the common law.

[1] App. III. (3) § 2.
[2] Ibid § 15.
[3] Ibid §§ 32, 35.
[4] Ibid § 13.
[5] Ibid § 15.
[6] App. III. (4).
[7] Ibid §§ 1-4.
[8] Ibid § 4.
[9] Ibid § 5.
[10] Ibid § 6.
[11] Ibid § 7.

It would have made the common-law modes of conveyance necessary if the use was to be transferred, and it would thus have stopped beneficial developments in the law of conveyancing. On the other hand, it would not have stopped the practice of devising land, which was so hurtful to the king's pecuniary interests. The limitation put upon the effect of a recovery, and the retention of the power to devise, lead me to think that this was a scheme put forward by the landowners. They wished to concede as little as possible, and hoped to minimize their concessions by introducing a clause which modified the effects of a common recovery. It was essentially a half-and-half measure. It was useless, or almost useless, to the king; and probably therefore it never had a chance of passing into law.

The more complete scheme, which is in substance enacted in the Statute of Uses, is contained in two draft bills.[1] They did not tinker with the problem as the other bill had done, but boldly annexed the legal estate to certain uses in land. Thus they got rid of the various evils attending the separation between the legal and equitable estate in the case of those uses to which they applied. But they did not abolish uses, as some had advocated; and thus they preserved for the land law the elements of elasticity, and the opportunities for development, which were inherent in the use. The points wherein these draft bills differed from the statute actually enacted are merely verbal. In fact they show signs of having been corrected so as to embody the small changes made during the passage of the bill through Parliament.[2]

The draft bill concerning the enrolment of covenants, contracts, bargains, or agreements made with reference to the uses of lands[3] is as elaborate as the two last-mentioned draft bills concerning uses and wills; and it is clearly intended to be supplemental to them.[4] It proposed to enact that the use of lands should not pass nor be created by reason of "any recoveries, fines, feoffments, gifts, grants, covenants, contracts, bargains, agreements, or otherwise," unless declared by writing under seal and enrolled as provided by the Act.[5]

[1] L. and P. Henry VIII. vol. ci ff. 252, 261 *et seq.*, calendared L. and P. Henry VIII. x nos. 246 (1), and 246 (2); these two documents are in substance identical so far as they go; but the former is much torn in one place, and it stops short some distance before its natural conclusion.

[2] Because they are substantially similar to the statute I have not thought it worth while to print them.

[3] L. and P. Henry VIII. vol. ci f. 303, calendared L. and P. Henry VIII. x no. 246 (6), printed in App. III. (5).

[4] It assumes that the use will pass by a bargain and sale, which would have been impossible under the first scheme.

[5] "The use . . . of suche londes shall not pass, alter, chaunge from on to an other nor shalbe had or made by or to any person or persons to any use or trust or confidence by reason of any Recoveries fynes Feoffments gyftes grauntes Covenaunts contracts bargeyns Agrements or otherwyse, Onles that the use trust

Further, it provided that, for the future, all evidences of any kind should be enrolled.[1] One chief officer or more (to be called the Master of Enrolments) was to be appointed by the king in each shire and riding; and for each of these officers a clerk was to be appointed by the chancellor, to be called the Clerk of Enrolments. They were to take acknowledgments of and to enrol evidences and writings concerning lands within their districts;[2] they were to take an oath of office to act honestly, and to see that the parties to these documents were capable of disposing of their property;[3] and they were to have a seal wherewith to seal the documents acknowledged before them. The date of the acknowledgment and the number of the roll on which they were to be enrolled were to be endorsed on the deed; and all documents not enrolled within forty days of their date were to be void.[4] The deeds so enrolled were to be absolutely conclusive upon all parties to them.[5] The fees of these officials and their qualifications for office were fixed; and penalties were provided for neglect of duty. It is interesting to note that it was the committee of the Council, created by the Act pro Camera Stellata of 1487, which was given jurisdiction in such cases.[6] The clerk and the master must act together in taking acknowledgments. The clerk must prepare the rolls; and, within thirty days after the end of the year, must deliver them to

or confidence . . . be declared by wrytinges suffycyently to be made under seale . . . and that the same wrytyngs be enrolled in manner and forme underwrytten."

[1] "Also it ys ordeynyd . . . that all manner of evydences and wrytinges, of what name soever they be, concernyng londes tenementes or heredytaments, which shall be made after the said laste day of July . . . 1536, shalbe knowleged and enrolled in manner and Forme as shalbe hereafter expressed in thys acte."

[2] There was a proviso at the end for the enrolment of the conveyances of land which lay in sundry shires in such shire as the party might elect.

[3] "That . . . they shall not Receve the knowledge of any persons beinge naturall foles or not of hole mynde, and that they shall endevour themselves with all due cyrcumstance to knowlege and serche that the persons knowledgynge any evydences or wrytinges a for them do it of their true and good wytte."

[4] A relaxation was made in cases where the party making the deed died within the forty days.

[5] "No person . . . shalbe admitted to denye the same evidences and wrytynges soo knowlegyd and ynrollyd to be his . . . dede, Nor to allege that they were not hole of mynde at the makinge and sealinge of them nor that suche evydences or wrytinges were made by mynasses or duresse of imprisonment;" it was, however, provided in a later part of the Act that the lands of *femes covert* should not be conveyed from them, "but after suche ordre and forme as hath hertofore be accustomed by the course of the lawes of the Realme."

[6] "In case any of the seid offycers or Clarkes do falsely and untruly exercyse and use the seyde office in any parte that shall apperteine to the same, or take any more or other fees than is above lymyted by this Acte, and be thereof convict by witnes proves or confessyon before the lord Chauncellor lorde Tresorer lord presydent of the kinges most honorable Counseill lord pryvy seall or any of them syttyng yn the sterre Chamber at Westminster and Calling to them the too chyff justices of eyther bynche for the tyme beinge or one of them, that then every of them, so beinge convicte, shall lose his offyce, and gelde treble damages to the party greved, And over that shall have imprysonment of his bodye tyll he have made fyne att the kynges wyll and pleasure;" for this Act see vol. i 493-495.

the master, who within the next thirty days must deposit them in the Chancery. These rolls were to be open to the public, and could be searched and copied on payment of fixed fees. Lands in towns, where conveyances were enrolled before the mayor or other officer, copyholds, and conveyances enrolled in the Chancery or before the Exchequer or the judges of either bench, were exempted from the necessity of enrolment. Landowners were allowed, if they wished, to enrol evidences made before the Act came into force; and similarly persons were to be allowed, if they wished, to register "all oblygacyons, acquytaunces and other wrytinges consernyng personall thinges." Being enrolled, they were to have the same force and effect as if they had been acknowledged before a court of record.

This is a remarkably comprehensive scheme for the registration of conveyances; and, if it had been passed and efficiently carried out, we should have to-day in working order a series of county registers, which would have considerably simplified the land law. We should not have been faced with the difficulty of fitting a scheme of registration on to a system which the large powers of landowners and the ingenuity of conveyancers have made more complex than any other modern system. Such a scheme would have been easy to apply to a comparatively youthful legal system, and in a country which was as yet by no means densely populated. The then existing defects in the land law were caused chiefly by the complexity of the procedure in the real actions, and by the need to regulate uses. The first defect was to a large extent remedied by the substitution of the more convenient action of ejectment for the older real actions; and the second would have been remedied to a large extent by the Statute of Uses, if it had been combined with an Act providing a comprehensive scheme of this kind for the registration of conveyances. The causes which render a scheme of registration so difficult to-day are largely the result of the failure to pass the bill proposed in 1536.

Parliament chose the right course when it passed the comprehensive scheme submitted to it for dealing with the problem of the use. It was necessarily a difficult and a complicated Act to consider; and perhaps Parliament was hardly prepared to face the labour of considering another Act quite as difficult and complicated. Perhaps, too, the lawyers again united with the landowners to throw it out; for it is clear that universal registration, and the publicity necessarily involved, were not quite in accordance with either of their interests. Certainly the pecuniary interests of the king were not so directly involved in the passing of these proposals. But the reasons for their abandonment we can only conjecture. We could only learn the truth if the missing

records of the proceedings of this Parliament were to come to light. Whatever the truth may be, it is clear that a great opportunity was lost for ever when this bill was rejected. Parliament declined to consider a general scheme of registration, and passed instead a short Act, supplemental to the Statute of Uses, to deal simply with those bargains and sales of freehold interests in land which the Statute of Uses had converted into conveyances. The ingenious conveyancer had not much difficulty in evading the obligation to enrol imposed by this makeshift piece of legislation.[1]

This history of the political causes which shaped the Statute of Uses enables us to appraise the preamble to the Statute at its true historical value. Like the preambles to other statutes of this period, it is far from being a sober statement of historical fact. Rather it is an official statement of the numerous good reasons which had induced the government to pass so wise a statute—the sixteenth-century equivalent of a leading article in a government newspaper upon a government measure. It bears upon it the traces of the alliance between the king and the common lawyers by means of which the statute had been carried through the House of Commons. It contains all the objections to uses which were the commonplaces of these lawyers—"the fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses intents and trusts;" the testaments made by dying men under the influence of greedy and covetous persons; the insecure titles of purchasers; the loss of dower and curtesy; the perjuries committed in the legal proceedings arising out of these secret uses. Skilfully insinuated among these objections, and holding by no means a prominent place, are those which the king felt so keenly—the loss of the incidents of tenure, of the lands of traitors, of land given to aliens, of the escheats, and of the rights to year day and waste of the lands of felons.[2]

[1] That the Statute of Enrolments did not extend to a bargain and sale for a term of years was recognized at least as early as 1595, Heyward's Case, 2 Co. Rep. at p. 36 a; it was decided in Lutwich v. Mitton (1621), Cro. Jac. 604, that a bargain and sale for a term followed by a release would pass the freehold. The statute did not refer to covenants to stand seised in consideration of love and natural affection, not, as Dr. Jenks (Short History of English Law, 121) says, because the legislature was "determined to tolerate them," but because they did not at this date operate as conveyances, see above 425-426. The reference in App. III. (4), § 6, to a covenant changing the use is not inconsistent with this view, since at this period, as Ames has pointed out, the term "covenant" is often used simply as a synonym for contract.

[2] "The lords have lost their wards, marriages, reliefs, heriots, escheats, aids *pur faire fils chivalier* and *pur file marier*. . . . The king's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftyly put in feoffment to the uses of aliens born, and also the profits of waste for a year and a day of felons attainted, and the lords their escheats thereof;" as a matter of fact lands held to the use of traitors had been declared forfeit by a statute of the preceding year, 26 Henry VIII. c. 13, § 4.

Maitland has truly said that the Statute of Uses "was forced upon an extremely unwilling Parliament by an extremely strong-willed king."[1] But I think that the evidence shows that this strong-willed king was obliged first to frighten and then to conciliate the common lawyers in order to get the Statute through the House of Commons; and that probably their opposition caused the failure of his well-considered scheme for the registration of conveyances. If this be so the action of the common lawyers has had a large effect upon the form which the Statute of Uses and the Statute of Enrolments finally assumed, and, consequently, upon the whole of the future history of the law of real property.[2]

(ii) *The provisions of the Statute and its immediate consequences.*

The governing idea of the Statute[3] is to take the seisin or legal estate from the feoffees to uses and vest it in the cestuique use—following the precedent set by a statute of 1483, which was passed to transfer to the cestuique use of Richard III. the legal estates which he had held in use before he became king.[4] This governing idea is contained in the first clause. In substance it runs as follows:—When any person or persons are, or shall be, seised of any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments to the use of other person or persons or to the use of any body politic; these other persons or bodies politic that have the use in fee simple, fee tail, for life or years, or for any estate in remainder or reverter,[5] shall be seised for the like estates as they had in the

[1] Maitland, Equity 35.

[2] Dr. Jenks thinks (Short History of English Law 100) that "the secret and unavowed purpose" of the Statute of Uses was to secure "the estates of the monasteries for the crown"—that in fact it was introduced in view of the Act against the smaller monasteries which was passed in the same session of Parliament as the Statute of Uses, 27 Henry VIII. c. 28. I cannot agree to this theory. In the first place, the evidence which I have adduced seems to show that the two objects of the Statute were (*a*) the improvement in the king's feudal revenue, and (*b*) a much-needed improvement in the land law; in the second place, the Statute was not needed for the purpose for which Dr. Jenks supposes that it was passed; in Acts of attainder it was common to include the lands of which the attainted person had the use and to exclude those of which he was merely feoffee to uses, above 423 n. 3; and for another illustration see 21 Henry VIII. c. 25; what the legislature habitually did in Acts of attainder it could equally well have done in the Act dissolving the smaller monasteries.

[3] 27 Henry VIII. c. 10.

[4] 1 Richard III. c. 5, "Be it ordeyned . . . that suche possession, right, title, and interesse of and in any londes . . . whereof the king is sole seiased by reason of any feoffement or estate made afore he was king, to the use of any other persone . . . veste and be in suche persone . . . to whose use he is so therof seased;" "for the precedent of this statute upon which it is drawn, I do find it 1 R. III. c. 5, where you may see the very mould whereon this statute was made," Bacon, Reading 417.

[5] "At the words 'remainder and reverter' it stops; it adds not any words, 'right title or possibility,' nor hath it not general words 'or otherwise'; whereby it is most plain that the statute meant to execute no inferior uses to remainder or reverter;

use; and the estate of the feoffees shall be adjudged to be in them that have the use for such an estate as formerly they had in the use. As it was the estate of the feoffees which was thus transferred, it followed that, unless an estate was given to the feoffees coextensive with that given to the cestuique use, the estate given to the cestuique use could only take effect to the extent of the estate given to the feoffees.[1]

The second clause deals with the case where divers persons are jointly seised to the use of one of them; and the third clause with the case where persons are seised of hereditaments to the use that some other persons shall have a rent out of them. In both cases the legal estate is vested in the cestuique use to the extent of his interest.

Then follow the provisos to the Statute. Clauses 4-7 deal with the woman's dower, and provide, as we have seen,[2] for the barring of dower by a legal jointure. Clause 8 provides that the execution of uses by the Act shall not discharge any statute, recognisance, or other bond. Clause 9 provides that all devises already made, or that shall be made, before the first of May, 1536, shall be valid. Clause 10 fixes the same date as the time from which the king shall be entitled to primer seisin, livery, ouster le main, fines for alienation, reliefs, or heriots, from the uses of land converted into legal estates by the statute; and the same date is fixed as the time from which other lords shall be entitled to fines, reliefs, and heriots. Clause 11 provides that cestuique use, who have estates executed by the Act, shall have all remedies and rights of action open to the feoffees to their use before the passing of the Act; and Clause 12 provides that actions pending against feoffees shall not be abated by the execution of the use. Clause 13 provides that nothing contained in the Act shall prejudice the king's rights to wardships of heirs now within age.[3]

The Statute of Enrolments[4] (which was, as we have seen, in the nature of another proviso to the Statute of Uses[5]) provides that, from the last day of July, 1536, no bargains and sales of estates of freehold or inheritance shall be valid, unless made in writing and under seal, and enrolled within six months of the date of the deed either in one of the king's courts of Record at Westminster, or in the county where the lands are situate.

The words of the Statute of Uses make it reasonably clear

that is to say no possibility or contingencies; but estates only, such as the feoffees might have executed by conveyance made," Bacon, Reading 427.

[1] Anon. (1560) Dyer 186; cp. Jenkins v. Young (1632) Cro. Car. at pp. 231, 245.

[2] Vol. iii 196.

[3] The two remaining clauses add nothing of permanent importance.

[4] 27 Henry VIII. c. 16.

[5] Above 455 n. 4.

that there was no intention to abolish uses.[1] As Bacon points out, both this Statute and the Statute of Enrolments in more places than one provide not only for uses then existing, but also for uses that shall be hereafter.[2] What it did intend to do was to execute or turn into legal estates the uses to which it applied, in order that the various evils which the preamble attributed to the division between the legal and equitable ownership might be avoided. It is also reasonably clear that the Statute did not apply to all uses. (1) The first clause deals only with the case where one is *seised* to the use of another. Seeing that when the Statute was passed the word "seisin" had come to be exclusively applicable to the hereditaments,[3] it could not apply when one was *possessed* of chattels real or personal to the use of another.[4] Though the words of the first clause made it clear that it applies where A is seised to B's use for a term of years, it does not apply where A is possessed of a term to the use of B. (2) The words of the first clause are applicable only to the case where A is seised to the use of B, i.e. where A is under the merely passive duty of allowing B to occupy the land for the estate limited to him by the instrument settling the uses, or by other directions given to the feoffees. It was in such cases that the evils mentioned in the preamble arose. B was in possession of the land and apparently owner; but he escaped all the liabilities of ownership, and had great opportunities for the defrauding of purchasers. It is quite another case where the feoffees are in possession and have active duties to perform.[5] The evils of divided ownership do not arise in such a case; and to have taken away from the feoffees their legal estate would have made it impossible for them to carry out their trust.

But though the Statute did not take away the power of creating uses, though it did not even execute all uses, it certainly executed what was the most numerous class of uses. It therefore subjected landowners entitled to the benefit of these uses to all the liabilities and disabilities of legal ownership; and, worst of all, it took away from them the power of devising their lands.

Both the common lawyers and the king obtained considerable

[1] Reading 423, "If they had had any such intent, i.e. to abolish uses, they would have had words express that every limitation of use made after the statute should have been void. And this was the exposition, as tradition goeth, that a reader of Gray's Inn which read soon after the statute was in trouble for—and worthily;" for this view and later modifications of it see Pt. II. c. 1 §§ 4 and 6.

[2] Reading 422.

[3] Vol. ii 581 and n. 2.

[4] Dyer 369a, pl. 50 (1580).

[5] Brook, Ab. *Feffementes al uses* pl. 52 (36 Hy. VIII.), "Home fait feoffement in fee al son use pur term de vie et que puis son decease J. N. prendra les profits, ceo fait un use in J. N. Contrar. s'il dit que puis son mort ses feoffees prendront les profits et liveront eux al J. N.: ceo ne fait use in J. N., car il n'ad eux nisi par les mains les feoffees."

advantages. The advantages gained by common lawyers were three in number. In the first place, they secured jurisdiction over the uses which the statute had converted into legal estates; and this brought to their courts no small accession of business. In the second place, they obtained the sanction of the legislature to all the current legal objections to uses; and, though these legal objections were not shared by the nation at large, the statement of them in this solemn form had, as we shall see, a considerable influence upon the manner in which the common lawyers, later in this century, dealt with the uses over which the Statute had given them jurisdiction.[1] In the third place, the Statute was a far less radical measure of law reform than those measures which a few years earlier the king had proposed to enact in accordance with the agreement between himself and the nobility.[2] On the other hand, the advantages gained by the king were quite as great. The Statute, by abolishing the power to devise freehold, made the incidents of tenure far more valuable than they would have been under a scheme which only gave the king the wardship of one-third of lands held by military tenure which had been devised, and continued to allow the devise of socage lands. The king gained pecuniarily; but at the price of the abandonment of his large scheme for the reform of the land law.

The advantages secured by the lawyers hardly appealed to the landowners, and the advantages secured by the king were diametrically opposed to their interests. So much hostility did the Statute arouse that it was by no means an unimportant factor in aggravating the danger caused by the Pilgrimage of Grace. No doubt the Divorce, the consequent religious changes, and the dissolution of the smaller monasteries, which had been brought about in the same session of Parliament as that in which the Statute of Uses had been passed, were the main causes of the rebellion.[3] But the repeal of the Statute of Uses figures in the demands of the rebels,[4] and it appears from the depositions of Aske[5] and others[6] that it was the abolition of the power to devise which was one of the chief causes which induced the landed gentry—the natural leaders of the counties—to side decisively

[1] "The preamble of this law was justly commended by Popham, Chief Justice, in 36 Reginæ, where he saith there is little need to search and collect out of cases before the statute what the mischief was which the scope of the statute was to redress; because there is a shorter way offered us by the sufficiency and fulness of the preamble," Bacon, Reading 418; see Pt. II. c. 1 § 6.

[2] Above 450-453.

[3] Above 38-39.

[4] L. and P. xi no. 1246 (20) (1536)—one of the demands of the rebels was to have the statute "that no man shall not will his lands," repealed.

[5] Ibid xii *i* no. 901 (1537).

[6] Ibid xii *i* no. 70 (x) (xi) (1537); cp. xiii *ii* nos. 307, 822 (1538).

with the rebels.[1] It would appear too that the lawyers had already invented a method of vesting property for a long term of years in trust in order to regain this power.[2] Henry was never under any illusions as to the nature and extent of the practical limitations upon his powers.[3] That he was well aware of the importance of securing the adhesion to his new religious settlement of a class upon whom the working of the local government depended, is clear from the manner in which he disposed of the monastic lands.[4] Having crushed the rebellion, and having improved his finances by the dissolution of the larger monasteries, he secured the adhesion of the landed gentry and their active co-operation, by restoring a large measure of the power to devise. In 1540—the year after the dissolution of the monasteries had been ratified by Parliament[5]—he reverted to the scheme which he had propounded eleven years before.[6]

The Wills Act of 1540[7] allowed those whose lands were held by socage tenure, whether in chief or otherwise, "full and free liberty power and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, all his . . . hereditaments at his free will and pleasure." But the king reserved his rights to primer seisin, reliefs, fines for alienation, and other payments. These were to be payable by the devisee, in the same way as they would have been payable by the heir if there had

[1] L. and P. xii *i* no. 70 (x)—one Phillip Trotter deposed, "that Mr. Dighton of Horton, George Stanes, and Mr. Dymmoke of Carlton asked the commons whether they thought it not good to make one article that men should be at liberty to make their wills, saying, 'Masters, men cannot now make their wills, for if they make a will now and happen to die twenty or thirty years after the making thereof the same will shall stand, and the testator shall not at any time after the making of the same will change anything contained therein. . . .' He thinks that all the gentlemen were among the commons willingly, for he saw them always busy to set forward their purposes with no less diligence than the commons themselves. . . . From the beginning to the end of the insurrection the gentlemen might have stayed it if they would, for the commons did nothing but by the gentlemen's commandment, and they never durst stir in the field from the place they were appointed to, till the gentlemen directed them what to do."

[2] Ibid xv no. 1028 (1540)—a lawyer who describes himself as "a poor young man who must gain a living without exhibition or friend," in a petition to Cromwell says that he has not since the Statute of Uses, "devised any estates to bring a term of years to the owner of the inheritance of any lands, with a remainder over, to declare a will;" this device is alluded to in 34, 35 Henry VIII. c. 5 § 8, and by a statute of 33 Henry VIII. c. 26 such a conveyance by Sir J. Shelton was found to be covinous, and declared void by Act of Parliament; but, when Bacon wrote, it was apparently a device commonly used; he says, Reading 422, "that may be an abuse of the law which is not against the law; as the taking long leases at this day of land *in capite* to defraud wardships is an abuse of law, but yet it is according to law;" it found no favour with Lord Ellesmere, below 472; apparently Aske, L. and P. xii *i* no. 901 (p. 408) hints at another device by which the son could be made to take as purchaser.

[3] Above 31, 453-455.

[4] Above 37.

[5] 31 Henry VIII. c. 13.

[6] Above 451-452.

[7] 32 Henry VIII. c. 1.

been no devise. Those who held land by knight service in capite, whether or no they held other lands of the king or any other lord, were allowed a similar power to devise two-thirds of their lands. In this case the king reserved his rights to wardship and primer seisin on one-third, and his fines for alienation on the whole of the lands devised. Those who held lands by knight service, not in capite of the king or of other lords, and also socage lands, were allowed to devise two-thirds of the former and all the latter lands. The rights of the king to wardship and primer seisin, and of the other lords to wardship out of a third of the lands were carefully saved; and, in case the yearly value of the third of the lands did not amount to the full value of a third of all the tenant's lands, the king and the lords were to be entitled to make up the deficiency from the two-thirds devised. If lands were settled in joint tenancy to two for life with remainder to the heirs of one, the king was to have the wardship and marriage of the heir, though the other joint tenant survived. The widow's dower was to be payable out of the two-thirds devisable. In 1542-1543 it was found that the breadth of the terms in which the power to devise had been conferred by the Act of 1540, needed some explanation.[1] It was declared that the power to devise extended only to lands held for an estate in fee simple, and did not give liberty to devise to a corporation. Devises made by married women, infants (under twenty-one), and idiots, were declared to be void. Gifts made fraudulently with intent to deprive the king or lord of his rights were also declared to be void. Provision was made for the manner in which the king's and lord's rights to the incidents of tenure from a third of the lands held in knight service were to be realized. A devise of more than two-thirds was to stand good for two-thirds, and, if the king's or lord's claims caused the eviction of a devisee, he could sue in Chancery to get compensation from the shares of the other devisees.

These two statutes of Wills were the direct results of the Statute of Uses. The king got back some part of his rights of which the practice of settling lands to uses had almost entirely deprived him; and the permanent settlement of these rights by the Act of 1540 was marked by the establishment in the same year of a new court—the Court of Wards—entrusted with the duty of seeing that they were duly enforced.[2] On the other hand, the landowner retained a large part of the power to devise which he had enjoyed for upwards of a century. The breadth of the terms in which that power was conferred created a new kind of future

[1] 34, 35 Henry VIII. c. 5. [2] 32 Henry VIII. c. 46.

interest in the land—the executory devise—which differed entirely from legal remainders, and in some respects from future interests created by way of shifting or springing use.[1]

(iii) *The extent to which the framers of the Statute of Uses succeeded in attaining the objects with which it was framed.*

Modern writers upon the law of real property have sometimes severely criticized the draftsmanship of the framers of the Statute of Uses; and they have maintained that, owing to their carelessness, it failed to carry out most of the objects which it was passed to attain. This was not the opinion of competent critics in the sixteenth century. Bacon said that, though it had been somewhat "perverted in exposition by the humour of the time," it was "the most perfectly and exactly conceived and penned of any law in the book," and, "the best pondered in all the words and clauses of it of any statute that I find."[2] We can safely follow Bacon and other lawyers of this period, who were no mean judges of legal draftsmanship; and, this being the case, it is not surprising to find that, so far from the Statute having failed to attain the objects with which it was passed, it attained them all. Later legislation, and changed ideas of public policy, may have settled the law in a manner very different from that in which it was settled by the Statute. But clearly we must distinguish between the results effected by the Statute itself, and those effected by these later influences. Let us look at the objects with which the Statute was passed, and see how far the Statute succeeded in attaining them, and how far the fact that they were not attained was due to later changes in the law.

We can group these objects under four heads: (1) The restoration to the king of his revenue from the incidents of tenure; (2) the abolition of the power to devise; (3) the restoration of publicity of conveyance; (4) the abolition, in the case of uses to which the statute applied, of the separation between legal and equitable ownership.

We have seen that the Statute accomplished the first two of these objects so effectually that it helped to cause rebellion; and that the king found it expedient to restore partially the power to devise, and to suffer the consequent diminution of his revenue from

[1] Pt. II. c. 1 § 4.

[2] Reading 416, "This Statute, as it is the Statute which of all others hath the greatest power and operation over the inheritances of the realm, so, howsoever, it had been by the humour of the time perverted in exposition, yet itself is the most perfectly and exactly conceived and penned of any law in the book, induced with the most declaring and persuading preamble, consisting and standing upon the wisest and fittest ordinances, and qualified with the most foreseeing and circumspect savings and provisoes, and lastly, the best pondered in all the words and clauses of it of any statute that I find."

the incidents of tenure.[1] The third object was attained because the Statute of Enrolments, which, as we have seen, must be regarded as an integral part of the Statute of Uses,[2] required the enrolment of all bargains and sales. It is true that the Statute made no provision for covenants to stand seised; nor did its framers foresee that ingenious conveyancers would evade the Statute of Enrolments by the device of a bargain and sale for a term of years followed by a release. But we cannot expect the framers of any statute to possess the gift of prophecy. We have seen that the covenant to stand seised was not a recognized form of conveyance at the time that the Statute was passed;[3] and it was not till many years later that the validity of the method of evading the Statute of Enrolments by means of a bargain and sale for a term of years was finally established.[4]

The question whether the Statute succeeded in accomplishing the fourth of these objects, by abolishing the separation between the legal and the equitable ownership, is rather more complicated. In the first place we must remember that the Statute did not attempt to abolish this separation in all cases. We have seen that it did not apply either to the case where A is possessed of chattels real or personal to the use of B, or to the case where the trustee has active duties to perform. The question is, did it succeed in attaining its object in the case to which it did apply, i.e. where A is seised of hereditaments to the use that he permit B to enjoy the property. The answer is that it did succeed for about a century, because the courts of law and equity set their faces against any attempt to evade the Statute by the limitation of a use upon a use.

Even before the passing of the Statute of Uses there had been at least one case in which the question of the validity of a use limited upon a use had arisen.[5] Whether any, and if so, what effect could be given to the second use was, according to the Doctor and Student, a debateable question.[6] But, on the whole, the courts seem to have inclined to the opinion that

[1] Above 465-466. [2] Above 455 n. 4. [3] Above 425-426.

[4] Lutwich v. Mitton (1621) Cro. Jac. 604; above 460 n. 1.

[5] Brook, Ab. *Feffementes al uses* pl. 40 (24 Hy. VIII.); cp. ibid pl. 54 (36 Hy. VIII.); Ames, Origin of Uses and Trust, Essays, A.A.L.H. ii 748; the will of William Bulmer (1524), Test. Ebor. v 189, provides a clear instance by the creation of a use on a use; he directed his feoffees to hold to the use of his wife for fifteen years "to such use and behove as I have charged my saide wif with."

[6] Bk. ii c. 21—the case put is a feoffment to X to the use that he pay a rent to AB; and the question is whether AB holds this rent to his own use if nothing further is said; the Student answers in the affirmative, "without the contrary can be proved, and if the contrary can be proved, and that the intent of the feoffor was, that he should dispose of it for him as he should appoint, then hath he the rent in use to another use, and so one use should be depending upon another use, which is seldom seen, and shall not be intended till it be proved."

no effect could be given to it on the following grounds: They were clearly of opinion that if a use was implied by law in favour of anyone, other than a volunteer, no further use could be expressed. Thus we have seen that if A enfeoffed B for a life estate or for an estate tail, B would hold to his own use, whether or no any further use was expressed, because the obligation arising from the tenure between A and B was a sufficient consideration to raise a use in B's favour.[1] On the other hand, if A enfeoffed B gratuitously for an estate in fee simple, no such obligation arose, and a use would be implied in A's favour;[2] but this implied use could be negatived if it was expressly stated that B was to hold to the use of X.[3] A, in other words, could waive a benefit which the law gave him. It was quite a different case if A enfeoffed B in fee simple to the use of X to the use of Y; for here two wholly incompatible uses were expressly limited. It was thought, and on the whole reasonably, that the same principle should be applied to the second of these uses, as was applied to an express use, which was incompatible with an implied use in favour of a tenant for life or in tail.[4] Therefore the use declared in favour of Y was void, because it was incompatible with the use previously declared in favour of X.

For a short time after the passing of the Statute of Uses some uncertainty on this point existed. In 1555, in the case of *Milborn* v. *Ferrers*,[5] the question whether any effect could be given to the second use was doubted; but three years later, in *Tyrrel's Case*,[6] the court of Wards, with the approval of the judges of the court of Common Pleas, decided that the second use was void. The facts of that case were as follows: Jane

[1] Above 429. [2] Above 424. [3] Above 424 and n. 5.

[4] That this was the line of thought comes out clearly in Brook, Ab. *Feffements al uses* pl. 40—"Home fist feoffment in fee al iiii al son use, et les feoffees fierent done in tayl al estranger sans consideration, qui n'avoit conusance del primer use, habendum in talliato ad usum de cesty que use et ses heires, le tenant in tayle ne sera seisi al primer use, mes al son use demesne quar . . . icy est tenure enter les donors et le donee que est consideracion que le tenant in tayle sera seisi al son use demesne, et eadem lex del tenant a term d'ans et tenant pur vie . . . La coment que use soit expresse ad usum le donor ou feoffor, uncore ceo est consideracion que le donee ou feoffee ceo avera al son use demesne. Et eadem lex ou home vend son terre pur xx li per indenture et execute estate al son use demesne, c'est voide limitation del use;" that this view was followed by the court of Chancery seems clear from Cary 14, "If A sell land to B for £20 with confidence that it shall be to the use of A, yet A shall have no remedy here, because the bargain had a consideration in itself;" cp. Holloway v. Pollard (1606) Moore (K.B.) 761—a decision of Egerton C. that no use upon a use could be recognized.

[5] Dyer 114b—If A and B his eldest son, enfeoff to the use of A to the use of his youngest son for life, provided that the youngest son during his life permits B and his heirs to make leases, reserving the rents to the youngest son during his life, remainder to the use of A in fee, *quære* whether a lease made by A for twenty-one years be good; clearly it is good if the second use is void.

[6] Dyer 155a; Benloe 61; 1 And. 37 pl. 96.

Tyrrel, for £400 paid by G. Tyrrel her son, by deed enrolled bargained and sold to G. Tyrrel all her lands, to hold to the said G. Tyrrel and his heirs, to the use of Jane for life, and after her decease to the use of G. Tyrrel and the heirs of his body, and, in default of issue, to the use of the heirs of Jane. These uses the court of Wards held to be void "because a use cannot be reserved out of an use." "And here it ought to be first an use transferred to the vendee before that any freehold or inheritance in the land can be vested in him by the inrollment. And this case has been doubted in the Common Pleas before now. . . . But all the Judges of the C.B. and Saunders, Chief Justice, thought that the limitation of uses above is void, for suppose the statute of inrollments had never been made, but only the statute of uses, then the use above could not be, because a use cannot be ingendered of a use." Or, as Anderson more intelligently says, "the bargain for money implies in itself a use, and the limitation of another use is merely contrary." In *Dillon* v. *Fraine* he expressly compares this case to the cases in which it had been held that a tenant for life or in tail could be seised to no use but his own, because, the tenure between feoffor and feoffee having raised an implied use in favour of the feoffee, no other use could be expressed.[1]

It would appear from Dyer's report that the court of Wards were of opinion that, if the use had been transferred to G. Tyrrel the son, by indenture inrolled, he might then have declared that he held to the use of Jane Tyrrel for life; but that this could not be done by one conveyance, because a use cannot be reserved out of a use. The reasoning of the court of Common Pleas was, however, somewhat different. They followed precedent, and laid it down that in no case could a use be executed which would contradict a use which arose by implication of law, whether by reason of a feoffment in tail or for life, or by reason of a bargain and sale. About the same time they also decided that no implied use could be raised which would contradict a use expressly declared—a logical decision of what was really the converse

[1] 1 And. at p. 313, "It is agreed [by Tyrrel's Case] that if one by deed indented and inrolled bargains and sells land to I.S. to the use of the bargainor for life or in fee or to the use of a stranger, this limitation of a use is wholly void, because by the sale for money a use is implied, and to limit another (even though it be by deed that the other use is limited) is merely repugnant to the first use, and they cannot stand together, and 24 H. 8 Br. tit. Feoffment al Uses 40 [above 429 n. 5] one cannot give land in tail to the use of another, because the tenant in tail cannot be seised to the use of any one else than himself and the heirs of his body, and cannot make a valid feoffment to him to whom the [second] use is appointed."

[2] 1 And. 37 pl. 95—"Note by all the judges that if one without consideration infeoffs another by deed to have and to hold land to the feoffee and his heirs to his

In coming to these decisions the court followed an obvious analogy, and applied both to the use implied from a bargain and sale, and to a use expressly declared, the law in force with regard to the use implied from a gift to A for life or in tail. But we have seen that, towards the end of the sixteenth century, some lawyers thought that the use implied by law in favour of the donee on a gift for life or in tail might be rebutted by express declaration.[1] But if this were so, why should not the use implied from a bargain and sale be likewise rebutted? If this could be done the decision in *Tyrrel's Case* could not stand. But by this time an alternative reason had been found for it. The court of Common Pleas had declined to separate the two uses, and allow the validity of a use declared upon the legal estate arising from the execution of the first use by the Statute.[2] Now a use was not regarded as having any existence at all at law.[3] It is true that in respect to some of its incidents the use of freehold land was assimilated by the chancellor to a hereditament;[4] but it had not all the qualities of a hereditament;[5] so that it could hardly be maintained that it was a true hereditament. But if it was not a hereditament no use declared on it could be executed by the statute.[6] It was in the same position as the use of a chattel real or personal.

But, if this reason is given for the decision, it may be asked why the chancellor should not enforce this second use. In an anonymous case of the year 1580 the judges, in answer to a question asked them by the chancellor, said that the use of a term of years was void in that it was not executed by the Statute of Uses.[7] But it is quite clear that the chancellor recognized these

(the feoffee's) own use, and the feoffee suffers the feoffor to occupy the land for divers years, still the right is in the feoffee, because an express use is contained in the deed, which is sufficient without any other consideration; the law is the same when the feoffment is made to the use of a stranger and his heirs;" see above 424 n. 5, 469.

[1] Above 429 n. 6; Anderson notes this diversity of opinion in his argument in Dillon v. Fraine (1589-1595), 1 And. at p. 313; and in Corbet's Case (1599-1600) 2 And. at p. 136 it was said, "Et (nient obstant le opinion de darren temps) si un done terre a auter in tail al use de auter et ses heyres, cest limitation de use est ousterment void come appier 24 H. 8."

[2] Above 470.

[3] Above 430, 440.

[4] Wimbish v. Talbois (1551) Plowden at p. 58 *per* Mountague C.J.; above 437-438.

[5] Winchester's Case (1583) 3 Co. Rep. at f. 2b.

[6] Bacon, Reading 425, "the fourth word is hereditament. . . . This word excludes annuities and uses themselves; so that an use cannot be to a use."

[7] Dyer 369a, "A being possessed of a lease for a term of years granted all his estate . . . to B and C and their assigns *to the use of the said A and his wife* for the term of their lives and of the longer liver of them. And afterwards the said A gave to a stranger such interest as he then had in the said lands in lease, and died. Whether this grant made by A gave all the term of B and C or not? And it was answered by all the Justices and the Chief Baron . . . that the gift or grant of him, in trust for whom the term was granted, was void, and out of the statute of *cestuyque uses* etc.;" after noting this case Crompton, Courts 65, says, "Mes done dun terme

uses.[1] If, it might be said, he enforced one kind of uses not recognized by the common law courts because not executed by the Statute, why should he not recognize another sort? But he certainly did not recognize these uses upon uses;[2] and the reason no doubt is that if the chancellor had enforced uses upon uses, such as those which were created in *Tyrrel's Case*, the king's revenue from the incidents of tenure would again have been depleted, and frauds upon creditors and purchasers,[3] and evasions of the laws imposing forfeitures for treason or felony and penalties for recusancy,[4] would have been facilitated. In short, all the objects specified in the preamble to the Statute would have been frustrated. *Tyrrel's Case* was decided in the court of Wards where the financial interests of the king were likely to have the greatest weight; and the chancellor was a great officer of state with whom similar considerations might also be expected to weigh.[5] However this may be, there is good evidence that at the end of the sixteenth century Lord Ellesmere agreed with the views expressed by those who framed the preamble to the Statute,[6] and expressed dislike for trusts for long terms of years made by tenants in chief, because they were used to defraud the king of his feudal revenue.[7] For these reasons, therefore, the court of Chancery was hardly likely in Ellesmere's time to render the Statute nugatory by recognizing the uses of uses. But, considering the financial straits of the government at the end of the sixteenth and the beginning of the seventeenth century, it was probably the financial reason which weighed the most heavily. At any rate we shall see that it was not till the incidents of tenure had become things of the past that the Chancery finally decided in all cases to enforce as trusts those uses upon uses which *Tyrrel's Case* had

pur ans al use est bon matter a cest jour in conscience, et que il avera *Subpena* in le Chauncerie."

[1] Brook, Ab. *Feffements al uses* pl. 60 (1556). "Done del terre pur ans ou dun lease pur ans a un use est bon, non obstant le statute de R. 3, quar l'estatut est intend d'avoyder dones de chatels al uses pur defrauder creditors tantum, et sic est le preamble et intent del cest estatut;" cp. 1 And. 293, 294 pl. 302, and last note.

[2] See Holloway v. Pollard (1606) Moore (K.B.) 761, where Lord Ellesmere recognized the rule that there could be no use on a use.

[3] See below 480-482, for the statutes directed against these frauds.

[4] See below 482, for statutes directed against secret trusts for some of these purposes.

[5] Vol. i 396-397 i; vol. v 217; Spedding, Letters and Life of Bacon v 252, where Bacon in a letter to James I. describes the Chancery as "the court of your absolute power."

[6] Hudson, Star Chamber, 69, tells us that Lord Ellesmere was of opinion that the Statute of Wills, which, as we have seen (above 465-466), had deliberately reversed the policy of the Statute of Uses, "was not only the ruin of ancient families, but the nurse of forgeries, for that, by colour of making wills, men's lands were conveyed in the extremity of their sickness, when they had no power of disposing of them."

[7] Cary 8; and the cases cited above 469 n. 4; see also vol. v 306 n. 6; Coke also in Lampet's Case (1612) 10 Co. Rep. at f. 52a pointed out that these trusts for long terms were made with this purpose.

declared to be void at law.[1] It was not until this result had been achieved, more than a hundred years after the passing of the Statute, that it can be said that it had failed to effect a union between the legal and the equitable estate in the cases to which it applied.

We must now turn to the broad results of the Statute of Uses upon the future development of uses and trusts at law and in equity.

(3) The Use at Common Law and the Equitable Trust.

The uses executed by the Statute, and thus brought within the sphere of common law jurisdiction, gave a much-needed elasticity to the land law, and enabled this essentially mediæval body of law to be adapted to the changed commercial, industrial, and agricultural conditions of the sixteenth and seventeenth centuries.[2] With the history of the technical developments in the law by means of which they produced this result I shall deal in the second Part of this Book.[3] Here I shall only indicate in brief outline the manner in which they influenced the future development of the land law.

The broad result of the conversion of the uses affected by the Statute into legal estates, was a large addition to the powers of the landowner, and an improvement in the means by which these powers were exercised. Since the Statute was not accompanied by any large reforms of the land law, landowners retained all their existing powers of dealing with their property, and, in addition, gained the new powers and the improved modes of exercising them which were rendered possible by the machinery of the use. The skill with which the conveyancers made use of the position which the statute had thus created enabled landowners to make full use of their opportunities: and they used them with very little interference on the part of the legislature. The chief limitation on their freedom of action came, not from the legislature, but from the courts.

We have seen that, from an early period, the courts had been astute to prevent any direct restrictions upon freedom of alienation.[4] The readiness with which they had allowed the estate tail to be barred by the device of a common recovery showed that they were equally astute to prevent the indefinite fettering of that freedom by the means of unbarrable entails,[5] even when the creation of these entails had the sanction of the legislature; and the restrictions which they placed upon the contingent remainder, the validity

[1] Vol. v 309; vol. vi chap. 8; for earlier cases in which these uses upon uses had been enforced under special circumstances see vol. v 307-309.

[2] Above 438-442.

[3] Pt. II. c. 1 §§ 4, 5 and 6.

[4] Vol. iii 85-86.

[5] Ibid 117-120.

of which they had come at length to admit,[1] were inspired by the same policy.[2] It was soon seen that the limiting of land in perpetuity to a succession of limited owners could be very easily effected by the machinery of the use. But we shall see that, from the latter part of this century, the courts, by applying to some of these interests the rules applicable to legal contingent remainders, and by applying to others principles which eventually developed into the modern rule against perpetuities, prescribed the utmost length of time for which future limited interests in all kinds of property could lawfully be made to endure.[3]

Subject to this restriction, landowners were able to use the new facilities which were now at their disposal very much as they pleased. We get therefore, in the first place, a much greater variety in the nature of the interests which can be created in the land, and, in the second place, a development in the machinery by which both these and other interests can be created or transferred.

(i) At common law a man could not convey an interest to himself or his wife.[4] This was quite possible by means of the machinery of the use: and was found to be convenient when it was wished to change trustees or to settle property on marriage.[5] At common law the only future interests in land which it was possible to create were reversions, and remainders vested or contingent; and, as we shall see, the liability of the contingent remainder to failure or destruction rendered it a precarious estate.[6] But future legal estates could now be created by means of shifting and springing uses.[7] It was ultimately held that they were not liable to failure or destruction in the same manner as legal contingent remainders; and the rules affecting their creation were not so rigid.[8] At common law it was not as a rule possible to separate the power of disposition over land from the estate in the land. It was not possible to give to A a limited interest, and to give either to A or to some third person, who had no estate in the land, a disposing power over the fee simple. But such powers of appointment could be created by means of uses.[9] Moreover, a settlor of property

[1] Vol. iii 134-136; Pt. II. c. 1 § 3.

[2] Ibid §§ 3 and 6.

[3] Ibid § 6.

[4] See the Eyre of Kent (S.S.) ii 178, for a statement of the rule and a suggestion by Spigurnel J. as to a means of evading it.

[5] Digby, History of the Law of Real Property (4th Ed.) 354; cp. Brook, Ab. *Feffementes al uses* pl. 51 (34 Hy. VIII.).

[6] Pt II. c. 1 § 3.

[7] Above 440 n. 10; Pt. II. c. 1 § 4; for an illustration of a shifting use after the Statute see Brook, Ab. *Feffementes al uses* pl. 59 (1556).

[8] Pt. II. c. 1 § 4.

[9] We get a good instance of such a power in Basset's Case (1557) Dyer 136a; cp. Digge's Case (1598-1600) 1 Co. Rep. 173a; for the common law power to sell lands devisable given to executors see vol. iii 136-137, 274; for the history of this and other powers see Pt. II. c. 1 § 5.

could give a power to revoke uses declared, and to appoint to fresh uses.[1] When the appointment was made the feoffees stood seised to the use of the appointee, the Statute executed the use in his favour, and so gave him the legal estate. The best illustration of the manner in which the conveyancers made use of these new facilities is the modern strict settlement of land. A person seised in fee simple is able to convey the property to trustees to the use of himself and his heirs till marriage, and from and after the marriage to the use of himself for life, with remainder to the use of his eldest and other sons successively in tail, with remainder to his right heirs. The claims of his widow and younger children can be met by rent charges on the property secured by limiting long terms of years to the use of the trustees in priority to the estates tail; and, if it is desired to give larger powers over the property either to the life tenant or the trustees, in the interests either of the family or of the needs of estate management, this can be accomplished by means of powers of appointment.

(ii) The methods by which lands could be settled or conveyed were simplified. The law will not, for three hundred years, allow that corporeal hereditaments lie in grant;[2] but a long step in that direction was taken when it became possible to limit a use by deed, and when the Statute annexed the legal estate to the person in whose favour the limitation was made. When the ingenuity of the conveyancers evaded the requirement of enrolment,[3] the landowner acquired not only a convenient, but also a secret, method of conveyance.

These new powers acquired by landowners had both their strong and their weak points. They enabled land to be settled in such a way that, while it devolved as one estate upon the eldest son, provision could be made out of it for other members of the family. Thus a succession of substantial landowners was created, who, in the seventeenth and eighteenth centuries, did good service in administering the local government of the country, in improving its agricultural condition, and in imparting an element of stability to the ordering of the classes of society.[4] On the other hand, these large powers of disposition, coupled with secret modes of exercising them, caused inevitably a large amount of complication in the law. The manner in which the new law was pieced on to the old added to the complication thus caused. It has made dealings in land expensive, because the whole history of the property must, on the occasion of each purchase, be critically examined by an expert. In the sixteenth, seventeenth, and eighteenth centuries the political

[1] Digges Case (1598-1600) 1 Co. Rep. 173a.
[2] 8, 9 Vict. c. 106 § 2.
[3] Above 460 n. 1.
[4] Above 372-373.

and social effects of the large powers acquired by the landowners probably outweighed the evils arising from the necessary complications in the land law which resulted therefrom. But changes in economic conditions, and in the political and social organization of the state, have gradually destroyed these compensating advantages, and created a demand for simplification, even at the cost of the sacrifice of some of the powers acquired by landowners during these three centuries.

The influence of the equitable trust has been more far-reaching than the influence of the uses executed by the Statute. These uses have affected only the land law. The equitable trust has affected not only the law of property, but also family law, and some parts of our public or semi-public law. And it is only natural that the influence of the equitable trust should have been more far-reaching; for we shall see that these equitable trusts were designed to suit modern needs, and that they were free from many of the technical defects of the mediæval use.[1]

(i) The two main branches of the law of property affected by the equitable trust have been the law as to chattels personal, and the law as to executors and administrators. When the Statute of Uses was passed the law as to chattels personal was rudimentary. It was regarded rather as a branch of the law of crime or tort than an independent branch of the law;[2] and we have seen that uses of these chattels were not affected by the Statute.[3] But the growth of commerce soon made some of these chattels personal quite as, if not more, important than interests in land. Such chattels as stocks and shares resembled land in that they were permanent in character and produced an income. The owners of such chattels, therefore, desired to be able to deal with them as a landowner dealt with his land. By means of the equitable trust such dealings could easily be effected. They could be settled to go in succession to a number of limited owners, and powers of appointment could be created over them. Similarly, when the court of Chancery absorbed the powers of the ecclesiastical courts over the administration of the estates of deceased persons,[4] it easily applied its rules as to the rights and duties and liabilities of trustees to the personal representative. It is the application of these equitable rules to the representative which has created the largest part of our modern law on this subject.

(ii) The two branches of our family law which the equitable trust has created are the law as to married women's property, and a considerable part of the law of infancy and guardianship. The

[1] Vol. v 304-307; vol. vi c. 8; Pt. II. c. 1 § 4.
[2] Vol. iii 318-360.
[3] Above 463.
[4] Vol. i 625-630; vol. v 319-320; vol. vi c. 8.

denial of all proprietary capacity to the married woman by the common law[1] was remedied by the invention of property vested in trustees to her separate use.[2] Over this property she was gradually given a complete power of disposition. Thus, by means of a properly drawn settlement, the married woman was given all, and sometimes more than all, the advantages which she would have enjoyed if the common law had treated her proprietary capacity as normal. The law of infancy and guardianship had remained in a rudimentary state largely owing to the long life of feudal wardship. When the disturbing influence of this mediæval institution was swept away, it soon appeared that there was a gap in our family law which the institution of the trust was peculiarly well adapted to fill.[3]

(iii) In thus filling up the gaps in our law of property and in our family law the equitable trust did some of the work which was done abroad by the adaptation of the principles of Roman law to the needs of the modern state. The subject matter of the English rules was very different from the subject matter of the continental rules; but, both in England and abroad, bodies of law were developed which dealt with analogous social needs and social relations. The influence of the equitable trust upon our public or semi-public law is wholly unique. By its means a set of institutions and a body of law were developed which have no parallel in any continental state. But to explain this I must briefly recall one or two of the salient features of the public law of this and the following century in this country and abroad.

We have seen that in the middle ages the law knew many miscellaneous communities and groups which performed many miscellaneous functions—governmental, charitable, religious, and social.[4] But these groups assorted badly with the new system of government which depended upon royal officials controlled from the centre.[5] They assorted as badly with the new view, taught by the Roman lawyers, that only a person natural or artificial could be recognized as capable of rights and duties; and that an artificial person could only be created by the sovereign.[6] It followed that these unincorporate groups were incapable of owning property; and without property the activities of a group must be very limited. Thus we find that abroad these miscellaneous mediæval groups gradually disappear, or become recognized corporations. In England we can see plain traces of similar legal doctrines. The common lawyers laid it down in the late fifteenth and sixteenth centuries that no unincorporate group can own

[1] Vol. iii 525-527.
[2] Vol. v 310-315; vol. vi c. 8.
[3] Vol. vi c. 8.
[4] Vol. ii 401-405; vol. iii 469; above 122-134, 152-158.
[5] Above 111-112, 163-165.
[6] Vol. iii 475-479.

property.[1] But both the law and the institutions of England in the sixteenth century retained a much larger mediæval element than the law and institutions of continental states.[2] Many of these unincorporate groups were both alive and active. Counties, hundreds, and parishes were essential parts of the machinery of government; and, whatever the lawyers might say, they sometimes possessed property.[3] And the lawyers themselves were organized in unincorporate Inns of Court, which, even in the sixteenth century, were owners of property on a fairly large scale.[4] Thus the obvious facts of important sides of English life were favourable to, we might almost say necessitated, a recognition of these various groups.

The legal recognition which the common law found itself unable to give was supplied by the machinery of the equitable trust. These groups might not be able to own property, but property could be held on trust for them. We have seen that as early as Henry VIII.'s reign the Chancellor entertained a suit by parishioners to enforce their rights to certain gild lands.[5] We have seen, too, that Henry VIII. regulated by statute certain trusts for religious purposes.[6] It is clear from the Elizabethan statutes relating to charitable trusts that much property was held by trustees for the most various charitable purposes.[7] But a device by which a group of persons may, through the medium of trustees, be given in substance the enjoyment of property, to be used for the furtherance of the purposes for which the group has come together, is capable of the most diverse applications; and from the sixteenth to the twentieth century it has been employed to effect the most various purposes.[8] In the religious world it has helped forward the cause of freedom of conscience, because nonconformist bodies, whom the state would hardly tolerate, have been able to

[1] Above 153.

[2] Above 163-165.

[3] Above 153; it was said in Porter's Case (1592) 1 Co. Rep. at p. 24b that, "almost all the lands belonging to the towns or boroughs not incorporate are conveyed to several inhabitants of the parish and their heirs, upon trust and confidence to employ the profits to such good uses, as defraying the tax of the town, repairing the highways, repairing the church, maintaining the poor of the parish or supporting other charges in the parish. . . . And it would be a thing dishonourable to the law of the land, to make such good uses void, and to restrain men from giving lands to such good uses."

[4] Vol. ii 499-503, 510; above 266.

[5] Above 439-440.

[6] Above 444 and n. 3.

[7] Above 393, 398-399; "Note reader that any man at this day may give lands tenements or hereditaments to any person or persons and their heirs, for the finding of a preacher, maintenance of a school, relief and comfort of maimed soldiers, sustenance of poor people, reparation of churches, highways, bridges, causeways, discharging of poor inhabitants of a town of common charges, for making of a stock for poor labourers in husbandry and poor apprentices, and for the marriage of poor virgins, or for any other charitable uses," Porter's Case (1592) 1 Co. Rep. at p. 26a.

[8] Maitland, Trust and Corporation, Collected Papers iii 356-403, was the first to point out clearly the nature of what is perhaps the greatest and certainly the most unique achievement of the trust.

enjoy property and apply it to the maintenance of their religious views.[1] In the political world it was used, in the eighteenth and early nineteenth centuries, to eke out the deficiencies of municipal government, by the creation of bodies of trustees to carry out such duties as those of lighting, paving, drainage, and road making.[2] In the commercial world it has been used to create organizations of persons engaged in a particular business, such as Lloyds and the Stock Exchange, which exercise large powers of discipline over persons engaged in that trade.[3] In the social world it has fostered the growth of all manner of clubs and societies.[4] In the literary world it has enabled institutions such as the London Library to be created;[5] and we who write legal history may remember that the Selden Society carries on its work under a trust.[6]

Thus in England the mediæval group did not altogether disappear. Like many another mediæval institution it survived because it was transformed;[7] and, in its transformed state, it became the ancestor of many new groups formed to forward many various activities of English life during the last three centuries. These new groups were necessarily different in many respects from their mediæval ancestors. They depended for their life upon a body of trustees acting under a trust deed which defined their powers. Thus their constitution and their activities were fixed—it may be fixed within wide limits—but still fixed. Because the mediæval group did not possess a written constitution, the sphere of its activities more easily admitted of modifications as and when occasion arose. It is for this reason that we find that these groups, which have flourished by means of the equitable trust, have been bodies formed for some specific purpose, the nature and manner of the fulfilment of which could be permanently defined by a trust deed. It was difficult, as the United Free Church of Scotland found, to alter even slightly the purposes for which the trust was created without losing all right to the trust property.[8] They are not suited therefore to bodies who wish to modify their aims and purposes with changing circumstances. Much less are they suited to the active conduct of a business; for it is clear that the rapid changes of policy which new emergencies and fresh

[1] Maitland, op. cit. 363, 364.

[2] Ibid 398, 399; Webb, Local Government, the Manor and the Borough 3 n. 2—Turnpike Trustees; 96 n. 2—trustees for the night watch and for paving in the Savoy; the jurisdiction of the court Leet was often taken over by a body of Trustees, ibid 122.

[3] Ibid 371-374.

[4] Ibid 377, 378.

[5] Ibid 388.

[6] Ibid.

[7] We may see parallels in the way in which mediæval institutions like the justices of the peace, the officers of the shire and hundred, the parish, and even Parliament itself were adapted to the needs of the modern state.

[8] General Assembly of Free Church of Scotland v. Lord Overton [1904] A.C. 515.

developments may at any moment demand are wholly incompatible with a precise written constitution. A commercial partnership or a corporate body are more suited to such a purpose because they can exercise a wider discretion than is possible under the necessarily fixed terms of a trust.

But, though the nature and constitution of the equitable trust thus limit the sphere of the activity of the groups which flourish under its shelter, their long life, their constant increase in number and variety, and the great part which they have played in our national life from the sixteenth century onwards, justify us in regarding them as the trust's most remarkable achievement. The Trust has in fact preserved, in a shape suited to modern legal and political ideas, the mediæval power to create groups; and these groups, because they are autonomous and yet subject to the law, have had a share in imparting a sound political instinct to the greater part of the nation who are members of one or more of them, hardly inferior to the share attributable to that peculiarly English system of local self-government, which enlisted all classes, from the highest to the lowest, in the service of the state.

The Land Law

The statutes relating to uses and wills of land are by far the most important of the statutes dealing with the land law. The remaining statutes can be summarized very much more briefly under the following heads: The prevention of frauds on creditors, purchasers, remaindermen or reversioners, and the crown; conveyancing; the doctrines relating to seisin; the limitation of the real actions; the interest of the termor; landlord and tenant; forcible entry.

(i) *The prevention of frauds on creditors, purchasers, remaindermen or reversioners, and the crown.*

The Statute of Uses put a stop to one method of defrauding persons who had an interest in, or who wished to deal with land. But fraudulent persons are generally resourceful; and it soon became necessary to pass statutes to deal with new forms of fraud. A statute of 1571 [1] recites that gifts of lands and goods to defraud creditors are "more commonly used and practised in these days than hath been seen or heard of heretofore," and enacts that such conveyances shall be void as against creditors whose actions are thereby defeated and delayed. Penalties were inflicted on all the parties thereto, and those who sought to take advantage of them; but it was provided that the statute should not affect those who

[1] 13 Elizabeth c. 5

had acquired the land for consideration without notice of the fraud. A statute of 1584-1585[1] provides for the case of the conveyance of lands with intent to defraud subsequent purchasers. Such conveyances were to be void as against the purchaser, his heirs, executors, administrators, or assigns. If a conveyance of land (other than a bona fide mortgage) contained a clause of revocation at the will of the conveying party, a subsequent sale for value was to make this clause void. Provision was also made for the registration of Statutes Merchant and Staple.

Twyne's Case, which arose on the former of these statutes, and *Standon* v. *Bullock*, which arose on the latter, show that both these statutes were extensively construed.[2] It would seem from these cases that the courts in the sixteenth century, as at an earlier period,[3] were pressed by the difficulty of trying the thought of man. How could a fraudulent intent be proved? They saw, of course, that it could only be proved by the surrounding circumstances; and accordingly they defined with elaboration the circumstances from which fraud could be inferred.[4] It is perhaps due to this elaborate definition that in later cases—in fact right down to the last quarter of the nineteenth century[5]—the courts adopted the practice of inferring fraud as a matter of law from certain facts, whether or not there was any actual intention to deceive. The most remarkable instance of the manufacture of this species of constructive fraud was the interpretation put upon the statute of 1584-1585. It had been laid down in *Standon* v. *Bullock* that, "voluntary estates made with power of revocation as to purchasers are in equal degree with conveyances made by fraud and covin to defraud purchasers."[6] As early as 1608 it was held that any voluntary conveyance was to be regarded as fraudulent as against a subsequent purchaser, merely because it was voluntary.[7] Notwithstanding decisions which laid down the more reasonable rule that the fact that a conveyance was voluntary

[1] 27 Elizabeth c. 4; it may perhaps be noted that § 10 of the statute provided that nothing therein contained should impair the jurisdiction of the Court of Star Chamber.

[2] (1601) 3 Co. Rep. 80b; both cases were decided in the Star Chamber.

[3] Vol. ii 51-54, 259; vol. iii 374; cf. 14 Elizabeth c. 6 § 2—the non-return of a fugitive contrary to 14 Elizabeth c. 3 is declared evidence of his determination not to return, and the determination, "whiche is but a secrete thought of the fugitive," is declared not material.

[4] Coke, loc. cit. sets out six characteristics from which it can be presumed that a gift is fraudulent.

[5] Cf. ex parte Mercer (1886) 17 Q.B.D. 290, with Freeman v. Pope (1870) 5 Ch. Ap. 538.

[6] 3 Co. Rep. at p. 83a.

[7] Woodie's Case, cited by Tanfield J. in Colville v. Parker (1608) Cro. Jac. 158.

was only evidence of an intent to defraud,[1] the view that any voluntary conveyance must be deemed to be fraudulent as against a subsequent purchaser prevailed.[2] It was not till 1893 that this strained construction was overruled by the legislature, and the natural meaning of Elizabeth's statute restored.[3]

The recognition of the common recovery as an effectual method of completely barring an estate tail,[4] had apparently led to frauds upon the rights of remaindermen and reversioners. A statute of 1540[5] provided that recoveries suffered by tenants for life, by the curtesy, or by tenants in tail after possibility, should be void, unless the recovery were suffered with the consent of the remainderman or reversioner. This statute was repealed, but in substance re-enacted in an improved form by a statute of 1572.[6] A king who was careful to preserve his revenue accruing from escheats and forfeitures, was not likely to permit his reversions or remainders to be imperilled by recoveries suffered by the tenant in tail. A statute of 1542-1543 provided that, if an estate tail was granted by the crown as reward for services,[7] a common recovery should not be able to bar the issue so long as the reversion or remainder was vested in the crown.[8]

The severity of the statutes directed against the treasonable practices of Roman Catholics, and the severity of the penalties against recusancy, naturally produced attempts to evade some of their consequences. Two statutes of 1586-1587 made provision against this. The first enacted that fraudulent gifts of property made by traitors should be void; and that all who claimed under such gifts must enrol them within two years, and produce evidence that they were made bona fide.[9] The second[10] enacted that secret conveyances made by recusants to evade the penalties for recusancy, imposed by a statute of 1580-1581,[11] should be void.

[1] Sir Ralph Bovy's Case (1672) 1 Vent. 193; Jenkins v. Keymis (1664) 1 Lev. 150; Lavender v. Blackstone (1675) 2 Lev. 146; cf. Cadogan v. Kennett (1776) Cowp. 434 for a dictum by Lord Mansfield to the same effect.

[2] Doe v. Manning (1807) 9 East 59.

[3] 56, 57 Victoria c. 21. [4] Vol. iii 118-120. [5] 32 Henry VIII. c. 31.

[6] 14 Elizabeth c. 8; see Lincoln College's Case (1596) 3 Co. Rep. at ff. 60b, 61a; and for the relation between these two Acts see Jennings's Case (1596) 10 Co. Rep. at ff. 45a, 45b.

[7] Co. Litt. 372b; Robinson v. Giffard [1903] 1 Ch. at p. 871.

[8] 34, 35 Henry VIII. c. 20—there is a curious proviso in this statute (§ 2) that the heirs in tail should not be entitled to any recompense in value against the vouchee or his heirs if such recoveries were attempted; this looks as if the vouchee was then not quite the man of straw that he afterwards became; see Lord Stafford's Case (1610) 8 Co. Rep. 73a; this statute is still in force, see 3, 4 William IV. c. 74 § 18; Robinson v. Giffard [1903] 1 Ch. 865.

[9] 28, 29 Elizabeth c. 3—provisos save the rights of purchasers, and of certain lessees of parts of the land commonly let to farm.

[10] 28, 29 Elizabeth c. 6.

[11] 23 Elizabeth c. 1; but in 1593 it was found necessary to deal with a conveyance made by Sir F. Englefield with this object by a private Act—which looks as if these statutes were not very successful.

(ii) *Conveyancing.*

Besides the Statute of Uses and the Statute of Enrolments one or two minor changes were made in the established methods of conveying or creating interests in land. We have seen that a statute of Henry VII.'s reign,[1] passed to restore the efficacy of fines to bar adverse claims, was construed to apply to the estate tail; and that a statute of Henry VIII.'s reign[2] confirmed this construction.[3] The latter statute made the fine an immediate bar to the issue, unless the fine was levied by a woman tenant in tail of lands *ex provisione viri*, by a person restrained by Act of Parliament, or by a tenant in tail of lands, the reversion of which was in the crown. In 1580-1581[4] a statute was made to avoid errors in fines and recoveries, and to provide for their amendment. It provided a special office for their enrolment; and in 1588-1589 a small change was made in the days in term on which fines were to be proclaimed in court.[5] In 1539 the writ of partition available to coparceners was extended to joint tenants in fee simple;[6] and in 1540 the privilege was extended to joint tenants for life or years.[7] In 1529 a bargain and sale by executors was declared to be good though made only by the acting executors.[8]

(iii) *Doctrines relating to seisin.*

We have seen that the person seised, though seised only of a limited estate or tortiously, might convey an estate in fee simple. If the heir of the person thus tortiously seised, or of the persons to whom the property had been conveyed, succeeded to the property, the true owner's right of entry was gone, and he could only sue by real action. This principle was limited by a statute of 1540,[9] which provided that the succession of the heir of a disseisor who had died seised, should not take away the true owner's right of entry, unless the disseisor had had peaceable possession for five years after the disseisin, without entry effected, or continual claim[10] made. We have seen also that a feoffment by certain limited owners did not give the tenant thereby injured a right of entry, but forced him to sue by real action. A conveyance which thus converted a right of entry into a right of action was said to work a discontinuance.[11] But we have seen that the operation of this doctrine had been already curtailed when Littleton

[1] 4 Henry VII. c. 24.
[2] 32 Henry VIII. c. 36.
[3] Vol. iii 120, 244.
[4] 23 Elizabeth c. 3.
[5] 31 Elizabeth c. 2.
[6] 31 Henry VIII. c. 1.
[7] 32 Henry VIII. c. 32; vol. iii 127.
[8] 21 Henry VIII. c. 4.
[9] 32 Henry VIII. c. 33.
[10] For continual claim see vol. ii 585.
[11] Vol. ii 585-586; vol iii 91-92, 93.

wrote.[1] It was still further curtailed by a statute of 1495[2] which provided that a doweress, and a woman who held lands in tail *ex provisione viri*, should not be able to convey any estate greater than that which they possessed; and that any attempt by feoffment or recovery to convey any larger estate, and thus to work a discontinuance, should entitle the reversioner to enter at once. Conversely, a statute of 1540 gave the wife and her heirs a right of entry notwithstanding any alienation made by the husband.[3] It is clear both from this legislation and from the legislation on the subject of fraudulent recoveries that the law was beginning to lay less stress upon actual seisin and more upon title.[4]

(iv) *The limitation of real actions.*

The omission to pass any statutes of limitation since the reign of Edward I. had, as we have seen, seriously impaired the efficiency of the real actions.[5] The result was to render the titles to property uncertain; and this uncertainty had aggravated the lawlessness of the fifteenth century. We have seen that it was intended in 1529 to enact that possession for forty years without an adverse claim should give a good title.[6] This reform had failed to take effect; but in 1540 a statute was passed which fixed certain periods of limitation for different classes of real actions, with an extension of these periods for those who were infants, married women, in prison, or out of the realm.[7] Those who did not sue within the periods fixed by the Act were barred, not from their right to the property, but from their capacity to assert such right by action.[8] The Act did not extend to the king; but in 1623 it was enacted that his right should be barred in sixty years.[9]

The statute of 1540 was not very efficacious. In the first place, even before Henry VIII.'s reign, the real actions had shown some signs of decadence;[10] and after his reign they rapidly decayed.[11] In the second place, since the statute only barred the remedy by

[1] Vol. ii 586; vol. iii 93.
[2] 11 Henry VII. c. 20.
[3] 32 Henry VIII. c. 28; Co. Litt. 326a.
[4] Pt. II. c. 1 § 2.
[5] Vol. iii 8.
[6] Above 451.
[7] 32 Henry VIII. c. 2—the times were—a writ of right 60 years, mort d'ancestor 50 years, claims by virtue of a person's own seisin 30 years, avowries for rents or services, formedons in remainder and reverter, and scire facias on fines 50 years; formedon in the descender is not mentioned, and it was held in Whitton v. Crompton (1569) Dyer 278, that the statute did not apply to it, but this was remedied by 21 James I. c. 2.
[8] "The first clause doth not bar any right, but prohibits that no person shall sue, have, or maintain any writ of right, or make any prescription, title, or claim," Bevil's Case (1575) Co. Rep. at ff. 11b, 12a; for the connection of the provisions of this clause with prescriptive claims to those classes of incorporeal things which fall within it, and its relation to the Prescription Act of 1832 see Pt. II. c. 1 § 9.
[9] 21 James I. c. 2; cf. Bl. Comm. iii 306-367.
[10] Vol. iii 26-28.
[11] Pt. II. c. 1 § 1.

action, it did not bar the claimant's right of entry.[1] A remedy for this was provided by the statute of 1623, which enacted that writs of formedon and rights of entry must be brought or enforced within twenty years after the right to bring the writ or make the entry accrued.[2] There was a proviso similar to that contained in the Act of Henry VIII., in favour of persons under disability; and to the list contained in that Act was added persons who were non compos mentis.[3] As no action of ejectment lay unless the lessor of the plaintiff had a right of entry, the result of the Act was to fix twenty years as the limitation for the action of ejectment,[4] which had then, as we shall see, become the most usual action for the recovery of land.[5]

Neither of these statutes affected the actions which lay for the recovery of an advowson, or the right to present to a living;[6] and no limitation was established till the Act of 1833,[7] following a suggestion of Blackstone, established a period of limitation "compounded of the length of time and the number of avoidances together."[8]

After the passing of the Acts of 1540 and 1623 the question naturally arose, What sort of possession by another person would turn the estate of the rightful owner into a right of action or entry? It is clear that it is not every possession by a person other than the owner which would have this effect. For instance, the possession of the land by a tenant for a limited estate would not, during continuance of that estate, turn his landlord's estate to a right of entry; for his landlord had no right of entry during its continuance. But generally it may be said that any possession which was taken or held under such circumstances that it was incompatible with the right of the true owner, i.e. any possession which was adverse to the true owner, would turn the true owner's estate to a right of action or a right of entry. Such possession would be adverse and turn the true owner's estate to a right of action if it was gained by a discontinuance or a deforcement, or if the right of entry was tolled by a descent cast.[9] In that case

[1] Bevil's Case (1575) 4 Co. Rep. 8a; at f. 11b it is said, "Although a man has been out of possession of land for sixty years, yet if his entry is not tolled, he may well enter, and bring any action of his own possession;" cf. 2 S.L.C. (10th Ed.) 634.

[2] 21 James I. c. 16 § 1. It might happen that, though the tenant in tail's formedon was barred, he had a subsisting right of entry, as such right only accrued on the death of the tenant for life, Hunt v. Burn (1702) 2 Salk. 422.

[3] § 2. [4] Bl. Comm. iii 307. [5] Pt. II. c. 1 § 1.

[6] 1 Mary Sess. 2 c. 5—that statute declared that Henry VIII.'s statute did not extend to writs of right of advowson, quare impedit, jure patronatus, darrein presentment, writ of right of ward or ravishment of ward; for these writs see vol. iii 17 n. 1, 24-26.

[7] 3, 4 William IV. c. 27 § 30. [8] Bl. Comm. iii 250, 251.

[9] Vol. ii 585-586; Challis, Real Property (3rd Ed.) 407-408; Bl. Comm. iii 175; Blackstone points out that the word deforcement is sometimes used in a general sense

the right of action would be lost after the period fixed by the Act of 1540. Such possession would be adverse and turn the true owner's estate to a right of entry if it was gained by disseisin, abatement, or intrusion.[1] In that case the right of entry, and therefore the right to bring the action of ejectment,[2] would be lost after the period fixed by the Act of 1623, and the true owner would be thrown back upon his right to bring a real action. But, unless the possession was thus adverse, neither of these statutes applied. One of their results, therefore, was to give a large importance to the doctrine of adverse possession,[3] which was not diminished till the Act of 1833 allowed the right of action and the title of the original owner to be barred by possession not technically adverse for twenty years after a right of entry first accrued.[4]

(v) *The interest of the termor.*

We have seen that, by the beginning of the fifteenth century, the interest of the termor had gained adequate protection by the development and improvement of the action of ejectment.[5] But he was still liable to be ousted by a fictitious recovery of which he had no notice. A statute of 1529[6] allowed him to falsify these recoveries in the same way as a freeholder was already able to do. But the practice of settling lands in such a way that the freeholder in actual possession had only a limited interest exposed the termor to another danger. On the determination of this interest he was liable to be ejected by the heir or other person entitled in succession. To permit this was quite contrary to the policy of the statutes for the encouragement of tillage;[7] and so a statute of 1540[8] gave him some protection by providing that, under certain conditions, certain leases[9] made by certain limited

to cover all cases of dispossession; but that it is used technically to mean "a detainer of the freehold from him that hath the right of property, but never had any possession under that right. . . . As in case when a lord hath a seignory, and lands escheat to him *propter defectum sanguinis*, but the seisin of the land is withheld from him," Bl. Comm. iii 173.

[1] Ibid 175; for seisin and disseisin see vol. iii 91-92; Pt. II. c. 1 § 2; abatement may be defined as "when a person dies seised of an inheritance, and before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold," Bl. Comm. iii 168; an intrusion is "the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion," ibid 169.

[2] Above 485.

[3] 2 S.L.C. (10th Ed.) 634, 635; Pt. II. c. 1 § 2.

[4] 3, 4 William IV. c. 27 §§ 2 and 3; 2 S.L.C. 640, 641; Pt. II. c. 1 § 2.

[5] Vol. iii 214, 216-217.

[6] 21 Henry VIII. c. 15—the provisions of the statutes extended also to those entitled by virtue of a statute merchant or staple.

[7] Above 365-366; cp. vol. iii 210-211.

[8] 32 Henry VIII. c. 28, amended by 34, 35 Henry VIII. c. 22.

[9] The Act did not extend to land not commonly leased within twenty years before the lease was granted; the leases must not be without impeachment of waste, or for

owners[1] should be good as against their heirs and successors, as if made by a tenant in fee simple. We must wait till the nineteenth century before we get any large extension of the policy of this statute.

(vi) *Landlord and tenant.*

The largest change in the law of landlord and tenant was made by the statute of 1540[2] which permitted certain covenants to run with the reversion. This statute was, as we shall see, passed in consequence of the large transfer of reversionary interests which resulted from the dissolution of the monasteries.[3] Another statute of the same year[4] allowed the executors or administrators of a landlord to sue or distrain for rent in arrear at the death of their testator or intestate. Similar provisions were made enabling a husband to recover rent in arrear in the right of his deceased wife, and a tenant pur autre vie to recover rent in arrear after the death of the cestuique vie. In 1529 some assistance was given to landowners who were injured by secret conveyances made by their tenants to persons unknown. The result of this practice was that the landlord did not know on whom to avow when he distrained for his rent or other services. It was therefore enacted that he might avow without specifically naming the tenant.[5] A statute of 1554[6] made some small improvements in the law as to the disposal of the things distrained, and the making of replevins. Some relief against forfeitures for non-payment of rent or non-performance of services was given to crown tenants in 1623-1624.[7]

(vii) *Forcible entry.*

In spite of the vigilance of the Council and the Star Chamber, forcible entries were by no means things of the past, even at the end of the sixteenth century. Apparently persons were in the habit of entering on property to which they were not entitled; the true owners forcibly re-entered; and then the persons without title, who had made the original entry, took proceedings under the statute of Henry VI.[8] to get possession. This was clearly an

more than twenty years or three lives; the usual rent must be reserved; the reversioners or issue were given the same remedies as the lessor, 32 Henry VIII. c. 28 § 2.

[1] They include "tenants in fee simple or fee tail in their own right, or in right of their churches or wives, or jointly with their wives," ibid § 1.

[2] 32 Henry VIII. c. 34.

[3] Pt. II. c. 1 § 7.

[4] 32 Henry VIII. c. 37.

[5] 21 Henry VIII. c. 19.

[6] 1, 2 Philip and Mary c. 12—no cattle distrained were to be driven from the hundred where they were taken, except to a pound overt not more than three miles away; no goods were to be taken to such a place that the owner was obliged to sue several replevins; the fee on impounding was fixed at 4d; sheriffs must appoint deputies to make replevins.

[7] 21 James I. c. 25.

[8] 8 Henry VI. c. 9; vol. ii 453; vol. iii 27.

abuse of the statute of Henry VI.; and so it was provided in 1588-1589[1] that no restitution should be given under this statute, if the party against whom the proceedings were taken had been in peaceable possession for the preceding three years.

None of these statutes cover any very large amount of ground. But taken together they effect some very practical and valuable reforms. From the close of this period until the beginning of the nineteenth century the development of the land law was left almost entirely to the courts, with very little help or hindrance from the legislature. And so during all these three centuries and later these statutes have retained their importance. Some of them are still in force; and others have only been repealed by modern statutes which carry out their policy more completely. Without their assistance it would hardly have been possible for the courts to have developed our modern law of real property from its mediæval basis.

Ecclesiastical Law

I have already dealt with the series of statutes which put the relations of the English church and the English state upon their modern basis.[2] We have seen that the canonists gave place to the civilians as judges of the ecclesiastical courts;[3] and that the construction of a new body of ecclesiastical law, better fitted to this new basis than the papal canon law, was also contemplated.[4] This new body of law was drawn up, but it was never enacted: and therefore so much of the papal canon law as is compatible with this new basis is still the law of the church, and the groundwork of the king's ecclesiastical law of the church of England.[5] But, seeing that the church was subordinated to the state, we get, from this century onwards, a larger number of statutes upon ecclesiastical topics than in the mediæval period; and some of this legislation dealt also with such ecclesiastical or semi-ecclesiastical foundations as the colleges in the two universities, and other charitable institutions. A few of these statutes relating to the altered status of the clergy and other persons connected with religion, to clerical discipline, to ecclesiastical property, to the marriage laws, and to jurisdiction over wills and grants of administration, must be briefly noticed.

[1] 31 Elizabeth c. 11; 21 James I. c. 15 extended the remedy to copyholders, termors, and other holders of chattel interests in land.

[2] Vol. i 589-596.

[3] Above 232, 238; 37 Henry VIII. c. 17.

[4] Vol. i 592, 594; 27 Henry VIII. c. 15; 35 Henry VIII. c. 16; 3, 4 Edward VI. c. 11.

[5] Vol. i 594.

(1) *Status of the clergy.*

The Reformation settlement involved certain changes in the status of those connected with the church. The monks in the Middle Ages were dead persons in law.[1] As a result of the dissolution of the monasteries it was necessary to give them the capacity of normal citizens. A statute of 1539 enabled them to purchase and hold real property, to sue and be sued, and to inherit real property the title to which accrued after their departure from religion.[2] Unless they were priests, or unless they had become professed after the age of twenty-one, they were allowed to marry. In 1551-1552[3] all restrictions on the marriage of priests were removed, their children were declared legitimate, they were to be entitled to curtsey, and their widows to dower.

(2) *Clerical discipline.*

I have already dealt with the statutes which began by restricting and modifying, and ended by altering the shape of the Benefit of Clergy.[4] Among other statutes relating to clerical discipline we may note a statute of Henry VII.'s reign enlarging the power of the bishops to proceed against incontinent priests;[5] and a statute of Henry VIII.'s reign forbidding clerics to farm land, to engage in trade, or to hold more than one benefice.[6] A statute of Elizabeth's reign[7] was designed to remedy abuses in the election of scholars, fellows, and officers of colleges in the universities, and in the presentation to benefices. Proof of bribery was to avoid the election of a scholar, fellow, or officer; and a simoniacal presentation was to be void. Penalties were imposed upon corrupt institutions to benefices, upon contracts to resign benefices in consideration of a money payment, and upon ordinations corruptly procured.

(3) *Ecclesiastical property.*

Certain changes were made in the manner in which ecclesiastical property was protected; and certain rules were made to ensure

[1] Vol. iii 458; P. and M. i 416-421.

[2] 31 Henry VIII. c. 6; amended by 33 Henry VIII. c. 29; and 5, 6 Edward VI. c. 13.

[3] 5, 6 Edward VI. c. 12; repealed 1 Mary stat. 2 c. 2; revived 1 James I. c. 25 § 8; for the dubious position of clerical marriages between the two last-named statutes see Hallam, C.H. i 173-174.

[4] Vol. iii. 299-302.

[5] 1 Henry VII. c. 2.

[6] 21 Henry VIII. c. 13.

[7] 31 Elizabeth c. 6; § 3 of this statute enacts that this Act shall be read at the election of all fellows, scholars, and officers of colleges, and also the orders and statutes of the college concerning elections, under a penalty of £40 from all who disobey; this sum to be recoverable by any informer, and half of it to go to him, and half to the college; any one who wished to reap a harvest of penalties under this statute by turning informer could victimize the fellows of some of the colleges in Oxford, and probably in Cambridge University.

its proper management. A statute was passed in 1535-1536 to regulate proceedings for the subtraction of tithes, which was to last till the revised code of ecclesiastical law should be completed.[1] In 1540 the dissolution of the larger monasteries (which were large tithe owners) called attention to the plight of lay impropriators, who were unable to sue either at common law or in the ecclesiastical courts. They were allowed to sue in the ecclesiastical courts, and those who refused to pay were threatened with imprisonment.[2] The law and procedure on the subject were consolidated by a statute passed in 1548.[3] In Elizabeth's reign several statutes were passed to ensure the proper management of ecclesiastical property. In 1558 the queen's rights to the temporalities of a see during vacancy were defined; and archbishops and bishops were forbidden to lease the lands of the see for longer than three lives or twenty-one years, and at less than the usual rent, unless the lease was made to the queen.[4] In 1571[5] a remedy was provided for fraudulent conveyances made by bishops or clergy in order to defeat their successors' right to take proceedings for dilapidations; and the same statute provided that deans and chapters and parsons and vicars should not be able to lease their lands for longer than twenty-one years or three lives. This provision as to powers of leasing was applied to colleges and hospitals. In 1603-1604 bishops and archbishops were prohibited from alienating to the crown the possessions of their sees.[6]

(4) *The marriage laws.*

The immediate cause of the break with Rome was a matrimonial question. It was to be expected, therefore, that the state would make some statutory modifications of the marriage laws. The existing marriage laws were founded upon the canon law.[7] Though the common law had, in certain cases in which matrimonial questions came under its jurisdiction, modified in some particulars the canon law, it left the main principles of the marriage law to be determined by the canon law and to be administered by the ecclesiastical courts. Nor did the Reformation settlement make any very large change. The marriage law still continued to be administered in the ecclesiastical courts; and, as we have seen, the law administered by those courts was the canon law, in so far as it was not contrary to the statutes which had

[1] 27 Henry VIII. c. 20.
[2] 32 Henry VIII. c. 7.
[3] 2, 3 Edward VI. c. 13.
[4] 1 Elizabeth c. 19.
[5] 13 Elizabeth c. 10.
[6] 1 James I. c. 3.
[7] Vol. i 621-623; on the whole subject see P. and M. ii 362-396; and cf. the authorities cited in the arguments in the case of The Queen v. St. Giles in the Fields (1847) 11 Q.B. at pp. 200-204.

established the church of England on its new basis.[1] The one subject upon which the legislature made new law was upon the degrees of relationship within which marriage was prohibited. The reason for this legislation was obvious. The canon law had multiplied indefinitely the range of prohibited degrees; and these rules had degenerated, as Maitland has said, "into a maze of flighty fancies and misapplied logic," which was only rendered tolerable by the wide papal power of dispensation.[2] Even the limits of this power were not accurately defined; and it was one of Henry VIII.'s contentions that the pope, in authorizing him to marry his deceased brother's wife, had overstepped the limits of his own powers.[3] But, now that recourse to the pope was cut off, it was necessary to lay down clear rules.

The principles upon which the legislature proceeded were the restoration of the prohibitions laid down in the Bible, the repeal of all others, and the prohibition of all dispensations with the law thus enacted;[4] but the history of the statutes by which effect was given to these principles is somewhat complex, owing to the political events of the period.

The prohibited degrees were defined in the first instance by statutes of 1533[5] and 1536.[6] The statute of 1533 was repealed in 1553,[7] and the statute of 1536 in 1554.[8] The modern law is laid down by a statute of 1540.[9] That statute was repealed in 1554,[10] but was revived in 1558.[11] It is therefore upon this statute that the law primarily rests. But recourse may also be had to the repealed statute of 1536 for the purpose of explaining the provisions of the statute of 1540. The reason for this is as follows:—Another statute of 1536,[12] concerning dispensations got from Rome, referred to the section of the repealed statute of 1536 on the subject of the prohibited degrees as a sound exposition of the law.[13] This statute was also repealed in 1554,[14] but it was revived by the Act of 1558;[15] and therefore the section of the

[1] Vol. i 594; the projected code of ecclesiastical law, which was never enacted, would have made large changes, Reeves H.E.L. iii 496, 497.

[2] P. and M. ii 387.

[3] Brewer, Henry VIII. ii 452-453.

[4] These principles are concisely summed up by Lord Campbell L.C. in Brook v. Brook (1861) 9 H.L.C. at pp. 206-207—"Before the Reformation the degrees of relationship by consanguinity and affinity, within which marriage was forbidden were almost indefinitely multiplied; but the prohibitions might have been dispensed with by the pope, or those who represented him. At the Reformation, the prohibited degrees were confined within the limits supposed to be expressly defined by Holy Scripture, and all dispensations were abolished. The prohibited degrees were those within which intercourse between the sexes was supposed to be forbidden as incestuous, and no distinction was made between relationship by blood or affinity."

[5] 25 Henry VIII. c. 22 §§ 2 and 3.

[6] 28 Henry VIII. c. 7 § 7.

[7] 1 Mary st. 2 c. 1 § 2.

[8] 1, 2 Philip and Mary c. 8 § 4.

[9] 32 Henry VIII. c. 38.

[10] 1, 2 Philip and Mary c. 8 § 4.

[11] 1 Elizabeth c. 1 § 3.

[12] 28 Henry VIII. c. 16.

[13] § 2.

[14] 1, 2 Philip and Mary c. 8 § 4.

[15] 1 Elizabeth c. 1 § 2.

repealed Act of 1536, which was thus referred to in the revived Act of 1536, can be used to explain the Act of 1540.[1] The prohibited degrees, as thus defined, were set forth by authority in 1563;[2] and, except in so far as they have been modified by the statute of 1907, which allows marriage with a deceased wife's sister,[3] they are still part of the law.

(5) *Jurisdiction over wills and grants of administration.*

The most important statute dealing with this jurisdiction was the statute of 1529,[4] which is the foundation of the present law as to the persons to whom the court must make grants of administration. With this subject I have already dealt.[5] I have also dealt with the statute 1601, which enacted that if administration were granted to some man of straw, who thereupon conveyed away the goods in fraud of the creditors of the estate, all who took the goods under these circumstances should be chargeable as executors de son tort.[6]

Criminal Law and Procedure

The events of this century left their mark upon the criminal law. The new position of independence and sovereignty over all its members, which the state had assumed as a result of the Reformation settlement, made some large additions to the law of treason very necessary; while the social, industrial, and economic changes were equally necessarily accompanied by additions to the lists of felonies and misdemeanours. At the same time other statutory changes took place in certain rules and institutions closely connected with the administration of the criminal law. I shall deal with these changes in the criminal law and in matters cognate thereto under the following heads: (1) Treason; (2) Felony; (3) Misdemeanour; (4) Topics connected with the criminal law and procedure.

(1) *Treason.*

The statutory additions made to the law of treason during this period may, as Stephen has pointed out,[7] be (with a few unimportant exceptions[8]) grouped under three main categories :—

[1] The Queen v. Chadwick (1847) 11 Q.B. 205; Brook v. Brook (1861) 11 H.L.C. at p. 225 *per* Lord Cranworth; at p. 244 *per* Lord Wensleydale.
[2] See Coke, Second Instit. 683-687.
[3] 7 Edward VII. c. 47.
[4] 21 Henry VIII. c. 5.
[5] Vol. iii 569.
[6] 43 Elizabeth c. 8; vol. iii 557; for executors de son tort see ibid 571-572.
[7] H.C.L. ii 263.
[8] These exceptions were as follows: 22 Henry VIII. c. 9—passed in consequence of the attempt of the bishop of Rochester's cook to poison him—made poisoning treason punishable with boiling to death; but by 1 Edward VI. c. 12 § 12 it was enacted that poisoning should be treated like any other murder; 31 Henry VIII. c. 8

Firstly, the statutes making it treason to interfere with the order of succession to the throne as established from time to time by statute; secondly, the statutes making it treason to recognize the authority of the pope, or to do certain other acts hostile to the new religious settlement; and, thirdly, expansions of the act of Edward III., which, as we have seen, has, throughout our history, continued to be the principal statute upon this subject.[1] The statutes coming within the first two categories are not of the same general importance as those coming within the third category, though many of them have lived long on the statute book.[2] They were, as Stephen has said,[3] the necessary consequences of the war between England and the Pope which was being waged in the reigns of Henry VIII., Edward VI., and Elizabeth; and they necessarily ceased to be of much practical importance when the issue of that war was settled. On the other hand, the statutes coming within the third category have very materially influenced our law of treason as it exists to-day. I shall therefore, in the first place, summarize shortly the statutes of comparatively temporary importance, and, in the second place, deal rather more fully with the statutes of more permanent interest.

(i) *The statutes of temporary importance.*

(*a*) *Statutes relating to the succession.* The desire to obtain an undisputed male heir to the throne was, as we have seen, one of the causes of Henry VIII.'s chequered matrimonial career.[4] His various marriages were followed by statutes which resettled the succession, and made certain acts done in contravention of these statutory settlements treason. In 1533[5] Henry's marriage with Catherine was declared void, and his marriage with Anne was declared valid. It was enacted that any persons who by writing, printing, or other overt act did anything to slander the

§ 6 made it treason to go beyond the sea to avoid the penalties for the breach of a royal proclamation issued under the authority of the statute; 33 Henry VIII. c. 21 § 8 made it treason for an unchaste woman to marry the king without revealing the fact, and § 10 made incontinence of the queen or wife of the Prince of Wales treason in the parties and accessories to the act; 1, 2 Philip and Mary c. 9 to pray for the queen's death was made treason; ibid c. 10 § 5 attempts against Philip, while acting as guardian of any child of the marriage between him and Mary after Mary's death, were made treason.

[1] Vol. iii 287.

[2] Thus many of the statutes of Elizabeth's reign designed to support the Reformation settlement, below 495-496, were not repealed till the last century.

[3] H.C.L. ii 257, 258—"If it is admitted and fully realized that the controversy between the king and the pope in Henry VIII.'s time was simply a war carried on between rival powers claiming jurisdiction of an analogous though distinct kind over the same population, it can hardly be said that the legal weapons used were other than those which on such an occasion must be used if the war was to be effective and thoroughgoing."

[4] Above 32.

[5] 25 Henry VIII. c. 22.

king's marriage, or the persons upon whom by the Act the crown was settled, should be guilty of treason; that if they did anything of this kind by words only they should be guilty of misprision of treason; and that a refusal to take an oath to observe the Act should be misprision of treason.[1] If the king died leaving infant children they were to be in the guardianship of their mother and a council, and all who opposed the mother and the council were to be guilty of treason. In 1536[2] the statute which annulled the marriage with Anne and settled the crown on the issue of the king and Jane Seymour containing similar but more stringent provisions. All who by words, writing, or overt acts did anything to the prejudice of the king's present marriage or of any future marriage, or who adjudged his former marriages valid, or who refused to answer interrogatories, or to take the oath required by the Act, were declared guilty of treason. Moreover it was provided that if any of the king's heirs or children claimed the crown contrary to the line of descent limited in the Act, they should be guilty of treason. In 1540[3] the statute which annulled the marriage with Anne of Cleves made it treasonable to assert its validity. In 1543[4] the statute which finally settled the crown, and gave the king power to limit the succession by his will on the failure of his issue, again made it treasonable to attempt anything contrary to the settlement so made; and in 1547[5] a provision, similar to that contained in the statute of 1536, made it treasonable for the king's heirs or successors to attempt to alter the line of succession as provided by the statute of 1543.

(*b*) *Statutes relating to the Reformation settlement.* The first of these statutes was passed in 1533-1534[6]—in the same year as the Act of Supremacy. It provided that any one who maliciously published by words or writing that the king was an heretic, schismatic, tyrant, infidel, or usurper, or any one who by words or writing practised or attempted to deprive the king, queen, or their heirs of their titles, names, or royal estates, should be guilty of treason. In 1536[7] the statute entitled "An Act extinguishing the authority of the Bishop of Rome," provided certain forms of oaths renouncing the Pope's authority and maintaining the royal supremacy, and enacted that a refusal to take

[1] Coke, Third Instit. c. 3 says that misprision is committed, "when one knoweth of any treason or felony and concealeth it;" but the offence of misprision of treason was extended to cover many other acts by this and other statutes; see vol. iii 389 n. 1.

[2] 28 Henry VIII. c. 7. [3] 32 Henry VIII. c. 25.

[4] 35 Henry VIII. c. 1. [5] 1 Edward VI. c. 12 § 8.

[6] 26 Henry VIII. c. 13; for the history of the bills (beginning in 1530-1531) which eventually became this Act see I. D. Thornley, Royal Hist. Soc. Tr. (3rd Series) xi 88-104.

[7] 28 Henry VIII. c. 10.

these oaths when commanded to do so should be treason. A statute of 1543-1544 [1] set out the king's style and made it treason to imagine or attempt to deprive the king, queen, or his heirs of "their titles, styles, names, degrees, royal estate, or regal power" annexed to the crown of England.

In 1547 [2] all the statutes relating to treason, and, as we shall see, to felony [3] passed in Henry VIII.'s reign were, with some exceptions, repealed. But the repealing statute in substance re-enacted some of their provisions. Thus, asserting by writing, printing, or other overt act that the king was not supreme head of the church was again made treason; and asserting this by words was made treason on a third conviction.[4] In 1551-1552 a similar provision was made against asserting that the king was a heretic or usurper.[5] At the beginning of Mary's reign all the legislation of the last two reigns was again repealed,[6] and the statute of Edward III. was again left as the sole statute in force.

In Elizabeth's reign the reversion to the Reformation settlement of Henry VIII. necessitated a renewal of legislation directed against the Pope and the Roman Catholics. A statute of 1558 [7] made it treasonable to affirm by writing, printing, or overt act that the queen ought not to be queen, or that any other person was entitled to the throne. To affirm this by words was made treason on a second conviction. In 1571 Pius V.'s bull of deposition and the activity of the Jesuits made further measures necessary. A statute passed in that year [8] made it treasonable (i) to publish, declare, hold opinion, or say that the queen ought not to be queen, or that any other person ought to be queen of England; (ii) to say that the queen was a heretic, schismatic, tyrant, infidel, or usurper; (iii) to affirm that anyone had a right to the throne after the queen's death contrary to any royal proclamation forbidding this; (iv) to deny, during the queen's life, that the common law, or that this or any other statute could limit the descent of the crown. Another statute of the same year made it treason to obtain or use any papal bull, or to give or receive absolution under the authority of these bulls.[9] In 1580-1581 [10] it was provided that all persons pretending to have power to absolve subjects from their obedience to the queen, or who practise to withdraw them to the Romish religion, or to promise obedience to any foreign potentate, and all subjects so absolved, or withdrawn, or promising obedience as aforesaid,

[1] 35 Henry VIII. c. 3.
[2] 1 Edward VI. c. 12.
[3] Below 504, 506.
[4] §§ 5 and 6.
[5] 5, 6 Edward VI. c. 11.
[6] 1 Mary Sess. 1 c. 1.
[7] 1 Elizabeth c. 5.
[8] 13 Elizabeth c. 1.
[9] Ibid 2.
[10] 23 Elizabeth c. 1; see also 1 James I. c. 4, § 14.

should be guilty of treason. In 1584-1585[1] all Jesuits were ordered to leave the kingdom within forty days, and all who remained longer or who came into the kingdom were declared to be traitors. All subjects who were being educated abroad in any Jesuit seminary were declared guilty of treason if they did not return and take the oath of supremacy within six months after a proclamation ordering them to do so.

(ii) *The statutes of more permanent interest.*

We have seen that at the end of Henry VIII.'s and Edward VI.'s reign the legislature reverted to the statute of Edward III. But it was often found necessary again to enlarge the scope of that statute. In fact its provisions were quite inadequate to protect the government of the state against attempts to subvert it. It is therefore to these statutory enlargements of some of its provisions that we must look for one important element which has gone to the making of our modern law of treason.

The clauses of Edward III.'s statute, which were designed to guard against attempts to subvert the government of the state, were those which made it treason to compass or imagine the death of the king, to levy war against the king, or to be adherent to his enemies.[2] It is clear, as Stephen says,[3] that these clauses were worded too narrowly if they were to be construed literally. They made no provision (*a*) against conspiracies to depose, imprison, or otherwise to harm the king, or (*b*) against conspiracies to levy war or to create internal disorder. Therefore from Henry VIII.'s to Elizabeth's reign a series of statutes was enacted designed to remedy these defects.

(*a*) The statute of 1533,[4] in addition to the provisions already mentioned, made it treasonable by writing, printing, or other external act to do or cause to be done anything to the peril of the king, or to the disturbance or interruption of his enjoyment of the crown, or of the succession as settled by the Act. Committing these offences by words only amounted to misprision of treason. A statute of 1533-1534[5] was more severe. Under that statute it was made treasonable, "to wish will or desire by words or writing, or by any craft to imagine invent practise or attempt any bodily harm to the king queen or their heirs," or, as we have seen, any deprivation of their dignity, title, or royal estate. There were similar provisions in the statute of 1536;[6] and, as we

[1] 57 Elizabeth c. 2.

[2] For this statute see vol. ii 449-450; vol. iii 291; for other mediæval legislation see vol. ii 450; vol. iii 292.

[3] H.C.L. ii 263.

[4] 25 Henry VIII. c. 22 § 5.

[5] 26 Henry VIII. c. 13.

[6] 28 Henry VIII. c. 7.

have seen, the statute of 1543-1544, which settled the royal style, made any imagination or attempt to deprive the king or his heirs of his title or style as settled by the Act treason.[1] These statutes having been repealed in 1547,[2] it was provided by the repealing statute that to compass or imagine by writing, printing or other overt act the deposition of the king should be treason, and that to do so by open and express words should be treason if the offence were repeated a third time.[3] This statute was repealed in 1553;[4] but by statutes of 1554 and 1558 substantially similar provisions were made.[5] In 1571 came a still more stringent enactment.[6] It was provided that anyone who by printing, writing or words should compass or imagine any bodily harm to the queen, or the levying of war against her within or without the realm, or the invasion of the realm by foreigners, should be guilty of treason.

(*b*) The foregoing statutes clearly brought within the law of treason conspiracies to levy war which had for their object the deposition or coercion of the sovereign. Conspiracies to levy war were in fact specifically mentioned in the Act of 1571. But they did not touch riots, or conspiracies to raise riots, which did not aim directly at the sovereign. Such riots were dealt with by a statute of 1549-1550.[7] It provided that if twelve or more persons assembled together to make a riot with the object of killing or imprisoning a privy councillor or of unlawfully altering the laws established by Parliament, and if they remained together for one hour after a summons to disperse, they should be guilty of treason; and that if forty or more persons assembled together for two hours or more for the purpose of doing certain kinds of damage (e.g. destroying inclosures), or any traitorous rebellious or felonious act, those so assembling and their wives and servants assisting them without compulsion, should likewise be guilty of treason. This Act was repealed in 1553.[8] By statutes of that year and in 1558 it was in substance re-enacted, but the offences were reduced from treason to felony.[9] Other acts of hostility to the king were brought within the scope of the law of treason by provisions in the statutes of 1534, 1551-1552, and 1572 against the detaining of fortresses, and ships or munitions of war, after orders given to surrender them.[10]

[1] 35 Henry VIII. c. 3; above 495.
[2] 1 Edward VI. c. 12.
[3] §§ 5 and 6.
[4] 1 Mary Sess. 1 c. 1.
[5] 1, 2 Philip and Mary c. 10; 1 Elizabeth c. 5.
[6] 13 Elizabeth c. 1.
[7] 3, 4 Edward VI. c. 5.
[8] Mary Sess. 1 c. 1.
[9] 1 Mary Sess. 2 c. 12; revived by 1 Elizabeth c. 16 which expired in 1603.
[10] 26 Henry VIII. c. 16; 5, 6 Edward VI. c. 11; 14 Elizabeth c. 1 § 2; the last named Act also made it treason to destroy the queen's ships and to bar any haven;

This series of statutes extending certain of the clauses of Edward III.'s statute ceases early in Elizabeth's reign. This, as we shall see, can be accounted for by the fact that a substitute had been found for this legislation in the large construction which the lawyers, encouraged by the example of the legislature and actuated by the same motives of public policy as those which inspired it, were prepared to put upon these clauses of Edward's statute. But with the growth of this doctrine of constructive treason I shall deal in the second Part of this Book.[1]

We have seen that the statute of Edward III. included under the crime of treason certain offences which, unlike those of which I have been speaking, were not political in character.[2] Some of these were extended by statutes of this century. Statutes of Henry VII.'s and Mary's reigns made it treason to counterfeit foreign coin current in the kingdom.[3] In 1554 it was made treason to import foreign counterfeit coin.[4] In 1562 a statute of Henry V., which made the clipping of coin treason, was revived,[5] and its stringency was increased in 1575-1576.[6] In 1572 counterfeiting foreign coin not current in the realm was declared to be misprision of treason.[7] Similarly the clause of Edward III.'s statute as to forgery of the Great Seal was extended to forgery of the king's sign manual, privy signet, or privy seal.[8] But the legislature sometimes recognized that such species of treason were offences of a character different from the treasons which were directed against the king and state. Some of these statutes provided that conviction for coinage offences created by them should not work corruption of blood;[9] and conversely the provisions made by statutes of Edward VI. and Mary to secure a fair trial of the prisoner were sometimes excluded.[10]

Of these provisions made to secure a fair trial of the prisoner

§ 1 of the Act made it felony to conspire to take, detain, burn, or destroy any of the queen's castles or fortresses if such conspiracy were evidenced by words acts or writings.

[1] Pt. II. c. 5 § 1; it may be noted that in 1554 in Throckmorton's Case (1554) 1 S.T. 869 the judges were quite prepared to give a large construction to Edward III.'s statute, see Stanford's dictum at p. 889, and Bromley C.J.'s ruling, and Throckmorton's reply at pp. 891-892.

[2] Vol. ii 449; vol. iii 289.

[3] 4 Henry VII. c. 19; 1 Mary Sess. 2 c. 6.

[4] 1, 2 Philip and Mary c. 11.

[5] 5 Elizabeth c. 11, reviving 4 Henry V. c. 6.

[6] 18 Elizabeth c. 1.

[7] 14 Elizabeth c. 3; the offence of counterfeiting farthing tokens contrary to the king's proclamation was a less serious offence of which the Star Chamber took cognizance in pursuance of its general jurisdiction to enforce proclamations, see Atty.-Gen. v. Taylor and Stevenson (1631) Rushworth vol. ii Pt. II. App. 33-34; Atty.-Gen. v. Hammond (1632) ibid 41; Crane v. Hawks (1635) ibid 69-70.

[8] 27 Henry VIII. c. 2, expressly saved in the repealing act 1 Edward VI. c. 12; 1 Mary Sess. 2 c. 6.

[9] E.g. 5 Elizabeth c. 11; 18 Elizabeth c. 1.

[10] E.g. 1, 2 Philip and Mary c. 10 § 12 and c. 11.

there were two. Firstly, for the treasons which could be committed by spoken words a short period of limitation was in many cases provided.[1] Secondly, the more important was a clause in the statute of 1551-1552 which enacted that a charge of treason should be substantiated by two accusers.[2] Throughout the latter part of the sixteenth and seventeenth centuries it was an unsettled question whether or not this clause was repealed by a clause in the statute of 1554,[3] which provided that all trials for treason should be according to the due order and course of the common law and not otherwise. Coke, by drawing a very artificial distinction between the witnesses to the indictment and the witnesses at the trial, held that the statute of 1551-1552 was still in force;[4] and this ruling seems to have been followed in 1660.[5] But later it was questioned;[6] and, it would seem from Hale's somewhat reluctant opinion in the first volume of his Pleas of the Crown,[7] rightly questioned. It is true that he is content to follow Coke's opinion in another passage in the second volume;[8] but the legislature, by requiring specifically two witnesses for many of the new statutory treasons, showed that it did not rely upon this view of the law.[9] Nevertheless the rule was adhered to on the occasion of Strafford's impeachment,[10] in the case of Whitbread and Fenwick in 1678,[11] and in all treason trials after the Revolution.[12] To clear up the doubt the legislature provided in 1696 that the testimony of two witnesses was essential.[13]

Two other enactments of 1541-1542 and 1572, relating to the procedure on a trial for treason and to the consequences of a conviction, were designed to strengthen the hands of the government. Certain of the clauses of the first of these statutes were

[1] 1 Edward VI. c. 12 § 19; 5, 6 Edward VI. c. 11 § 7; 1, 2 Philip and Mary c. 10 § 10; 1 Elizabeth c. 5 § 8; 13 Elizabeth c. 1 § 8.

[2] 5, 6 Edward VI. c. 11 § 9; see generally Wigmore, Evidence iii 2712-2717 § 2036.

[3] 1, 2 Philip and Mary c. 10 § 6. [4] Third Instit. 25-27.

[5] Kelying 9; though Bridgeman C.J. and other judges dissented, ibid 18.

[6] Ibid 49-50; it is there pointed out that Coke's authorities do not bear him out, "and there are many other things in his posthumous works, especially in his pleas of the Crown concerning treasons, and in his jurisdiction of the courts concerning Parliaments, which lie under a suspicion whether they received no alteration, they coming out in the time of that which is called the Long Parliament;" as it is there said it is difficult to see how it can be held that the plain words of the later statute do not repeal the earlier; and the judges seem to have been of this opinion in 1555, Dyer 131b; and they were certainly of this opinion on Raleigh's trial in 1603, 2 S.T. 15.

[7] Hale, P.C. i 298-300. [8] Ibid ii 286.

[9] 1 Elizabeth c. 5 § 10; 13 Elizabeth c. 1 § 9; the fact that the statute of 1554 itself required two witnesses for the treasons created by that Act seems to me to be conclusive as to the view of its framers.

[10] (1640) 3 S.T. at pp. 1450, 1463, 1479. [11] 7 S.T. 119, 120.

[12] Foster, Discourses 237; for his argument that this was the right view see ibid 237-240.

[13] 7 William III. c. 3 § 2.

both short-lived and savage. They provided that insanity supervening after the commission of treason should be no impediment to the trial, and should not excuse from punishment.[1] These clauses were repealed by the statute of 1554 which provided that all trials for treason should be according to the course of the common law.[2] But two other clauses of this statute, which provided for the forfeiture "as well of uses rights entries conditions, as possessions remainders reversions and all other things" without office or inquisition found,[3] survived till 1870.[4] The second of these statutes dealt with conspiracies to liberate those charged with or convicted of treason. It provided that a conspiracy to liberate such persons before indictment should be misprision of treason, that a similar conspiracy after indictment should be felony, and that after attainder it should be treason.[5]

The only statute of this period which made any relaxation in the severity of the substantive law of treason as defined by Edward III.'s statute was the famous statute of 1494.[6] It enacted that faithful service to a king *de facto* should not render the person doing such service liable to the penalties of treason, on the restoration of the king *de jure*. Though passed to meet the political needs of the moment,[7] it has been more permanent than any of the other statutes of this period on the subject of treason. It is the only one of them which still forms part of our present law.

(2) *Felony*.

The extensions of the sphere of felony during this period took two forms. In the first place some of the older felonies were

[1] 33 Henry VIII. c. 20 §§ 1-3; these clauses gave power to try in their absence persons who had become insane after they had committed treason.

[2] 1, 2 Philip and Mary c. 10 § 6; Coke, Third Instit. 6; Hale, P.C. i 35.

[3] §§ 3 and 4; the Act also amplified 26 Henry VIII. c. 13 which provided for the forfeiture of entailed lands as against the traitor and his heirs; see Dowtie's Case (1584) 3 Co. Rep. at f. 10b; Hale, P.C. i 240 seqq.; but it was repealed by 34, 35 Henry VIII. c. 20 in respect of estates tail granted by the Crown; however, a later Act of 5, 6 Edward VI. c. 11 § 6 had the effect of making land held by a tenant in tail of the gift of the crown liable for forfeiture, and so repealed the clause of 34, 35 Henry VIII. c. 20 which had prevented this result, Hale, P.C. i 243-244; for the effect of the clauses of 33 Henry VIII. c. 20 on powers of appointment see Sugden, Powers (8th Ed.) 182-186; Pt. II. c. 1 § 5. Note that lands held by a corporation sole were only forfeited for treason during the life of the traitor; the Acts which dissolved the monasteries, 27 Henry VIII. c. 28 § 3, and 31 Henry VIII. c. 13 § 4, made the forfeiture perpetual; but the common law was restored by 5, 6 Edward VI. c. 11 § 12; see I. D. Thornley, Royal Hist. Soc. Tr. (3rd Series) xi 117-119.

[4] 33, 34 Victoria c. 23.

[5] 14 Elizabeth c. 2.

[6] 11 Henry VII. c. 1; cf. vol. iii 468.

[7] Stephen, H.C.L. ii 254-255; this is shown by the proviso to the statute "that no person or persons shall take any benefit or advantage by this Act which shall hereafter decline from his or their allegiance;" this proviso is, as Hale says, P.C. i 274, "dark and dubious;" if strictly construed it would go far to deprive the Act of all but a temporary importance, except as to persons born during an usurpation; see Kelyng at p. 14, and Vane's Trial 6 S.T. at pp. 152, 175, 178-179.

extended in scope, and in the second place a large number of new felonies were created. I shall deal with the legislation on this subject under these two heads:—

(i) *Extensions of the older felonies.*

In 1604 the statute of stabbing,[1] said to have been passed in consequence of the affrays between Englishmen and Scotchmen at James I.'s court,[2] enacted that if a man stabbed another who had no weapon drawn or had not first struck at the stabber, and the person stabbed died within six months, the stabber should be guilty of murder. As Stephen has pointed out, the development of the law as to the circumstances under which homicide is committed with "malice prepense," and so is murder, has superseded the necessity for the statute.[3]

In 1623-1624 the scope of murder was further extended by a statute which made a mother who concealed the death of her bastard child liable to the punishment for murder.[4]

In the offences against property several extensions were made. We have seen that a statute of 1527 created the offence of larceny by a bailee if the bailee was a servant. It enacted that if servants, not being apprentices or under the age of eighteen, embezzled goods entrusted to them of the value of 40s. or upwards, they should be guilty of felony.[5] This Statute was repealed by the Act of 1553 which repealed the Acts of Henry VIII.'s reign creating new felonies;[6] but it was revived and made perpetual by an Act of 1562-1563.[7] In 1589 persons who embezzled munitions of war to the value of 20s. or upwards, which had been entrusted to them, were likewise declared to be guilty of felony.[8]

In 1562-1563 a much-needed consolidation and extension of the law as to forgery was effected.[9] We have seen that in the Middle Ages the scope of forgery had been very narrow. Besides the kinds of forgery which were treason, the only forgery punishable at common law was the reliance on a false document in a court of law.[10] A statute of Henry V.'s reign had given a civil remedy to those whose title to real estate had been disturbed by

[1] 2 James I. c. 8. [2] Stephen, H.C.L. iii 47.
[3] Ibid 48-49; for this development see Pt. II. c. 5 Introd. and § 6.
[4] 21 James I. c. 27.
[5] 21 Henry VIII. c. 7; vol. iii 365; 27 Henry VIII. c. 17 deprived those guilty of this offence of clergy and sanctuary.
[6] 1 Mary st. 1 c. 1 § 3; 27 Henry VIII. c. 17 was saved by the repealing act of 1547, 1 Edward VI. c. 12 § 18.
[7] 5 Elizabeth c. 10. [8] 31 Elizabeth c. 4.
[9] 5 Elizabeth c. 14; see generally on this subject Hale, P.C. i 682-687; Stephen, H.C.L. iii 180-188.
[10] Vol. ii 366; vol. iii 400.

the production before a law court of forged title deeds, and had enacted that the guilty person should be fined.[1] But beyond this the legislature had done nothing.

The inadequacy of the common law had led to the interference of the court of Star Chamber. It would appear from Hudson's treatise[2] that, throughout the sixteenth century, it had anticipated the legislature by exercising a general jurisdiction in cases of forgery;[3] and no doubt the cases which came before that court helped to call the attention of the legislature to the need for an improvement in the law. The Act of 1562-1563[4] testified in its preamble to the widespread practice of forging charters, evidences, deeds, and writings, and went on to provide that (i) the forgery of deeds, charters, court rolls, or wills in writing, with intent to disturb the title of any person entitled to an estate of freehold; or (ii) the giving in evidence in any action of such forged documents knowing them to be forged; should render the person guilty of these practices liable to be sued at common law or before the Star Chamber by the person injured, and also liable to be punished by the forfeiture of the rents and profits of the land for his life, by perpetual imprisonment, and by the pillory, branding, and loss of ears. Similar but less severe penalties were provided for those who forged deeds with intent to claim a lease for years or an annuity, or who forged obligations, acquittances, or releases. On a second conviction all these offences were made felony without benefit of clergy.

After this statute was passed the Star Chamber ceased to exercise jurisdiction in all cases where the accused had already been convicted of a first offence,[5] since it had no power to deal with felony. But in all other cases it exercised concurrent jurisdiction with courts of common law; and it did not cease to exercise its former jurisdiction over cases not touched by the statute[6]—"many

[1] 1 Henry V. c. 3; vol. ii 452.

[2] Treatise on the Court of Star Chamber Pt. II. § 6, Coll. Jurid. vol. ii; for Hudson and his Treatise see vol. v 164-166.

[3] Hudson says, op. cit., "Infinite are the examples of punishments inflicted upon forgeries of all sorts before the statute of 5 Elizabeth;" for an interesting case of 1433 dealt with by the Council see Danvers v. Broket, Select Cases before the Council (S.S.) 97.

[4] 5 Elizabeth c. 14; see Coke, Third Instit. c. lxxv for an exposition of the statute; the analogous offence of levying fines, suffering recoveries, and acknowledging statutes, recognisances, bails, and judgments in the names of other persons not privy or consenting thereto was made felony by 21 James I. c. 26.

[5] "In which case (i.e. of a second offence), although forgery be here properly examinable, yet the second forgery, which is felony, may not be here examined to prepare a trial against the life of a man; as it was adjudged *Tr.* 1 *Jac.* inter *Reade and Booth* concerning the forging of the deeds of *Sir Thomas Gresham's* lands," Hudson 65.

[6] "If the offence of forgery be said to have been done against the laws and statutes of this kingdom, the offence may be punished at this day, as it was before the statute; or, if it be within the statute, this court hath power to inflict the punishment of the

are the forgers," says Hudson, "which have been sentenced in this court which were not within this law."[1] This seems to have given rise to the belief that, apart from the Act, forgery was punishable at common law[2]—a belief which was certainly not historically true. But it was a belief which enabled the common law courts, after the abolition of the court of Star Chamber, to treat as misdemeanours cases of forgery which did not fall within the Act.[3] Though the Act and the cases decided under it helped to make the definition of forgery more precise, the wide jurisdiction of the Star Chamber, in this as in other cases,[4] helped to broaden permanently the outlook of the common law judges, and so to widen the sphere of the criminal law.

(ii) *The new felonies.*

(*a*) *Riots.*

The statute of 1549-1550 which enacted that those taking part in certain kinds of riotous assemblies, and not dispersing after due notice, should be guilty of treason, enacted also that those taking part in certain other kinds of riotous assemblies, and not dispersing after due notice, should be guilty of felony.[5] The latter class of assemblies were those which met for the purpose of destroying certain kinds of property;[6] or of securing the forcible abatement of rent or the price of corn. Moreover it was further enacted that those who summoned, procured, moved, or stirred any such assembly should be guilty of felony.[7] We have seen that in 1553 the offences which were treason under this Act were made felony.[8]

(*b*) *Damage to Property.*

Unless damage to property took the form of arson it was not at common law a criminal offence. It was redressible only by the semi-criminal remedy of trespass.[9] In 1530-1531 breaking

law. But if the bill be laid upon the statute, then must the offence be proved to be within the statute, or else no sentence can be given," Hudson 65.

[1] Ibid 70—he gives as instances, a case of 4, 5 Philip and Mary where a sentence was given for forging testimonials; a case of 12 James I. where Harvey, an alderman of Bridgwater, was sentenced for putting the town seal to a certificate of good behaviour without the consent of the mayor and alderman; similarly razure of writs, and inserting names in blank warrants of sheriffs was punished.

[2] Ibid 66; and Coke seems to assume this, Third Instit. 168, 169; cf. Bl. Comm. iv 245.

[3] Viner, Ab. *tit.* Forgery A. § 3, and cases there cited; Comyn. Digest, *tit.* Forgery A. 1.

[4] Vol. v 201, 203, 204, 208, 212.

[5] 3, 4 Edward VI. c. 5 § 2.

[6] Breaking the inclosure of any park, or the banks of any fishpond, or conduit, or the destruction of deer, rabbit warrens, dovehouses, fish in ponds, houses, barns, stacks of corn.

[7] §§ 3 and 10.

[8] 1 Mary Sess. 2 c. 12; above 497.

[9] Vol. iii 370.

certain dykes in Norfolk and the Isle of Ely was made felony, and this statute was revived by an Act of 1555.[1] In 1545 it was made felony to burn or cut a frame of timber prepared for making a house; and other forms of damage to person and property were made misdemeanours, for which the offender was liable to a fine of £10, and an action for trespass for treble damages at the suit of the injured party.[2] The felony created by this Act was repealed by the Acts of 1547 and 1553;[3] and the misdemeanours created by the Act were in some respects modified by an Act of 1562-1563.[4]

(*c*) *Immorality.*

In 1533-1534 the offence of sodomy was made a felony.[5] This Act having been repealed in 1547, it was again provided in 1548 that the offence should be felony, with the salutary provisos that conviction should not entail corruption of blood, that the period of limitation should be six months, and that no one who might profit by the conviction should be a competent witness against the accused.[6] This Act was repealed in 1553;[7] but in 1562-1563 the statute of Henry VIII. was revived and made perpetual.[8] In 1575-1576 the violation of females under ten years of age was made felony without benefit of clergy.[9] In 1603 bigamy was made a felony, with a proviso that the Act should not apply if a wife or husband were absent beyond the sea for seven years, or if neither had heard of the other for that time.[10]

(*d*) *Abduction.*

In 1487 it was provided that all who carried off women, who were the heiresses of property, against their will, and all who procured, aided, and abetted the carrying off, or who received the woman so carried off, should be guilty of felony.[11] It was provided that the Act should not extend to those who carried off women claiming them as their wards or villeins. In 1597-

[1] 22 Henry VIII. c. 11; 2, 3 Philip and Mary c. 19; Coke, Third Instit. c. xlv.
[2] 37 Henry VIII. c. 6.
[3] 1 Edward VI. c. 12; 1 Mary Sess. 1 c. 1 § 3.
[4] 5 Elizabeth c. 21; below 506. In 1601 an Act for parts of Cumberland, Westmoreland, Northumberland and the bishopric of Durham made several forms of damage to person and property, particularly common there, felonies without benefit of clergy.
[5] 25 Henry VIII. c. 6; for the earlier history of this crime, which before this Act was an ecclesiastical offence, see P. and M. ii 554, 555.
[6] 2, 3 Edward VI. c. 29.
[7] 1 Mary Sess. 1 c. 1 § 3.
[8] 5 Elizabeth c. 17.
[9] 18 Elizabeth c. 7.
[10] 1 James I. c. 11—there was also a proviso in favour of those divorced by the ecclesiastical courts, in cases where those courts had pronounced a degree of nullity, and in cases of marriage before the age of consent; Porter's Case (1637) Cro. Car. 461; Hale, P.C. i 692-694.
[11] 3 Henry VII. c. 2.

1598 it was enacted that those convicted under this statute as principals, procurers, or accessories before the fact, should be deprived of benefit of clergy.[1] We shall see that other offences of a similar kind were made misdemeanours by a statute of 1557-1558.[2]

(*e*) *Hunting and Game.*[3]

The legislation on this subject proceeded on many different principles. Sometimes it proceeded on the principle that assemblies for the purpose of hunting and sporting gave opportunities for riot and disorder; sometimes on the principle that hunting and sporting ought to be the privilege of the landowners, and that other classes ought to employ themselves in a manner more suited to their condition in life; and sometimes on the principle that it resulted in the wanton destruction of game. We can see all these principles underlying Richard II.'s statute on this subject;[4] and they appear clearly enough in the various statutes of this period.

The earliest statute was passed in the first year of Henry VII.'s reign,[5] and was directed mainly to the suppression of disorder. It was recited that hunting in forests, parks, and warrens in disguise led to rebellions and riots; and it enacted that hunting in disguise or by night should be felony, and that the rescue of such offenders should likewise be felony.

Certain statutes of Henry VIII. created new felonies partly in order to suppress the evils of unlicensed sporting, partly in order to preserve the rights of the king and other landowners. A statute of 1539[6] made fishing in a private pond by night, and breaking the head of a private pond by night or day, felony; and another statute of the same year[7] made it felony to steal falcon's eggs in the royal manors, and to fail to restore to the king within twelve days a hawk which had been found. It was also made felony to enter by night or at any time in disguise into any chase or park belonging to the king or his children with intent to steal, slay, or hunt deer or rabbits. The provisions of this statute were modified in 1540.[8] Killing deer in any park by night or at any time in disguise was made felony if the park was enclosed; but it was provided that all tenants could kill the rabbits on their own land. These statutes of Henry VIII.'s

[1] 39 Elizabeth c. 9.
[2] 4, 5 Philip and Mary c. 8; below 514.
[3] See generally in this subject vol. i 107-108; Stephen, H.C.L. iii 276-282.
[4] 13 Richard II. st. 1 c. 13; vol. ii 466; Stephen, H.C.L. iii 277.
[5] 1 Henry VII. c. 8.
[6] 31 Henry VIII. c. 2.
[7] Ibid c. 12.
[8] 32 Henry VIII. c. 11.

reign were repealed in the first year of Edward VI.'s reign.[1] The two last mentioned were revived in 1549 for three years, but were suffered to expire at the end of that time.[2]

The statutes which proceedcd on the principle that game ought to be preserved, generally made offences against them misdemeanours; and, after Edward VI.'s reign, no statute, except that of Henry's VII.,[3] made offences in connection with hunting and sporting a felony. A statute of 1495[4] imposed penalties on those who took pheasants' or partridges' or hawks' or swans eggs on another's land, and a statute of 1503-1504 was passed to prevent the destruction of deer and herons.[5] In 1523[6] penalties were imposed on those who tracked and snared hares in the snow, and in 1540 on those who sold partridges.[7] In 1562-1563 breaking the heads of ponds, fishing in private waters, breaking into a deer park made with the queen's licence and hunting the deer, and taking the eggs of hawks were made misdemeanours.[8] In 1581[9] taking and killing pheasants and partridges by night on another's land, and hunting with spaniels in standing corn without the consent of the owner of the corn were prohibited. There was further legislation in 1603-1604 and 1609-1610 against the destruction of pheasants, partridges, and hares, and as to the penalties for unlawful taking;[10] and against the destruction of deer and rabbits in 1605-1606 and 1609-1610.[11]

(f) Religion.

Of the offences against religion the first and foremost was heresy. We have seen that in the Middle Ages it was an offence which was punishable by the ecclesiastical courts; but that in this period it was brought under the jurisdiction of the common law courts. I have already said something of its history and of the chief statutes relating to it.[12] In Henry VIII.'s, Edward VI.'s, and Elizabeth's reign the maintenance of the new religious settlement necessitated the creation of a number of new felonies and misdemeanours. Illustrations are the Act of the Six Articles,[13] an Act of 1547 against those who spoke irreverently of the sacrament,[14] Edward VI.'s Act of Uniformity,[15] Elizabeth's

[1] 1 Edward VI. c. 12.
[2] 3, 4 Edward VI. c. 17.
[3] 1 Henry VII. c. 8.
[4] 11 Henry VII. c. 17.
[5] 19 Henry VII. c. 11.
[6] 14, 15 Henry VIII. c. 10.
[7] 32 Henry VIII. c. 8.
[8] 5 Elizabeth c. 21.
[9] 23 Elizabeth c. 10.
[10] 1 James I. c. 27; 7 James I. c. 11; for James's views on the necessity for the preservation of game see Works, 546-547.
[11] 3 James I. c. 13; 7 James I. c. 13.
[12] Vol. i 616-619.
[13] 31 Henry VIII. c. 14.
[14] 1 Edward VI. c. 1.
[15] 2, 3 Edward VI. c. 1; 5, 6 Edward VI. c. 1.

Acts of Supremacy and Uniformity,[1] and the legislation both of Elizabeth's and James I.'s reigns against Jesuits and other religious sectaries.[2] In 1605-1606 it was enacted that if any persons left the realm to serve any foreign prince without taking the oath of allegiance, or if any one who had held a commission in the army left the realm with a view to such service, without entering into a bond neither to be reconciled to the pope nor to be party to any plot against the king without revealing it, they should be guilty of felony.[3]

Perhaps the most curious development in the criminal law relating to religious or quasi-religious offences is to be found in the legislation against sorcery and witchcraft. Here again a set of offences, which had formerly come within the exclusive cognisance of the ecclesiastical courts, was taken over by the state. But to understand the statute law on this topic I must say something of the earlier history of this supposed crime.[4]

A belief in the occult powers of witches, magicians, and sorcerers is common to all primitive peoples.[5] Such a belief may change its form, but it is not necessarily dispelled by an advancing civilization.[6] With the advent of Christianity it took the form of a belief that the world was peopled with malignant demons, who, acting under the orders of their master the devil, were actively employed in preventing the extension of Christ's kingdom and in harassing the faithful.[7] Enactments of the early Christian emperors against magicians were preserved in Justinian's Code, and "did much harm in after ages."[8] The Bible clearly laid it down that a witch should not be suffered to live;[9] and the folk laws both of the Anglo-Saxons and of other tribes contained enactments against sorcerers.[10] Charlemagne in the ninth,[11] and Cnut[12] in the eleventh century, legislated against them.

In the earlier and darker ages men believed so implicitly in the power of the church and of the individual Christian to overcome these evil beings that comparatively little was heard of

[1] 1 Elizabeth cc. 1 and 2.

[2] 35 Elizabeth cc. 1 and 2; 1 James I. c. 4; 7 James I. c. 6.

[3] 3 James I. c. 4 § 12. The reason assigned is that, "It is found by late experience that such as goe voluntarily out of this realme of England to serve Forraigne Princes, States, or Potentates, are for the most part perverted in their religion and loyalty by Jesuites and fugitives, with whome they doe there converse."

[4] On this subject see P. and M. ii 550-554; Lecky, History of Rationalism i chap. i; Stephen, H.C.L. ii 430-436.

[5] Lecky, i 16, 17.

[6] Ibid 15—no doubt, as Lecky says, the main reason for the perdurance of the old belief was the fact that, "the ancient civilizations were never directed earnestly to the investigation of natural phenomena."

[7] Lecky, op. cit. i 20-26.

[8] P. and M. ii 551 n. 2; Code ix 18, there cited.

[9] Exodus xxii 18.

[10] P. and M. ii 551.

[11] Lecky, op. cit. i 41.

[12] Cnut ii 4, Liebermann 311.

proceedings for witchcraft and sorcery.[1] "The exact boundary between legitimate and the illegitimate sciences was vague. A little harmless necromancy would be met by blame that was tinctured by awe and admiration; bishops and even popes, it was whispered, had trifled with the powers of evil."[2] It was far otherwise when, with the revival of learning in the twelfth century, men "had learned to doubt but had not yet learned that doubt was innocent," when "the new mental activity had produced a variety of opinions, while the old credulity persuaded men that all but one class of opinions were suggestions of the devil."[3] War must be waged against the heresies to which such doubts gave rise; and of these heresies, the practice of witchcraft and sorcery was the most pernicious.[4]

"Sorcery," as Maitland has well said, "is a crime created by the measures taken for its suppression."[5] As persecution increased, the belief in and the horror excited by it became more intense. The strongest and acutest intellects of the day firmly believed that human beings could and did make compacts with the devil which gave them supernatural powers to inflict harm.[6] Two other causes contributed to foster this delusion. In the first place the intellectual conditions prevailing in the Middle Ages led men to suppose that all acts and events were immediately governed by the higher powers of good and evil.[7] Thus all sudden and apparently fortuitous calamities affecting peoples and individuals were ascribed to direct demoniacal interference. It was inevitable therefore that when such calamities occurred a search should be made for the human agents through whose instrumentality the devil worked. In the second place the procedure of the Inquisition, by means of which this search was conducted, made it inevitable that it would not be fruitless. The horrible punishments inflicted for the crime, and the tortures used to extort confessions, easily procured testimony from the heated imaginations of the terrified, the ignorant, and the superstitious. This testimony, coupled with the general sense of insecurity which such epidemic visitations as the Black Death produced, gave rise to a body of evidence as to the existence and

[1] Lecky, op. cit. i 37-40—"What may be called the intellectual basis of witchcraft existed to the fullest extent. All those conceptions of diabolical presence; all that predisposition towards the miraculous, which acted so fearfully upon the imaginations of the fifteenth and sixteenth centuries, existed; but the implicit faith, the boundless and triumphant credulity with which the virtue of ecclesiastical rites was accepted, rendered them comparatively innocuous."

[2] P. and M. ii 551.

[3] Lecky, op. cit. i 49.

[4] P. and M. ii 552.

[5] Ibid 554.

[6] Lecky, op. cit. i 66, instances such names as Thomas Aquinas and Gerson.

[7] Above 11-12; cp. vol. ii 129-130.

nature of these evil agencies which made it wholly absurd to deny their existence.[1]

The realistic imagination of mediæval men soon constructed a definite picture of the extent of the dominions of the devil, of the number ranks and employments of his subjects, and of the methods by which he was accustomed to harm and harass the human race.[2] In the fourteenth and fifteenth centuries the gradual decay of the beliefs, and the gradual change in the intellectual conceptions which underlay the life and thought of the Middle Ages, united with the growing definiteness in men's knowledge of the manner in which the devil worked, to cause a universal terror, which gradually overcast the horizon of thought, creating a general uneasiness as to the future of the church, and an intense and vivid sense of Satanic presence.[3]

The old intellectual system passed away in the sixteenth century. Its passing, so far from causing the decay of this superstition, gave it, in the first instance, an added strength. The religious conflicts of the Reformation tended to excite a religious fervour which increased men's consciousness of the consequences of sin, and of the reality of the active machinations of the devil. Heresy and witchcraft must be at all costs suppressed. Thus we find that all over the continent of Europe, in Protestant and Catholic communities alike, the war against witchcraft and sorcery was waged by church and state more fiercely than before. In the sixteenth century, as in the Middle Ages, the keenest intellects of the age gave it their active approval. Bodin wrote a book on the subject, in which he denounced the wickedness and folly of those who doubted the overwhelming evidence of the reality of the crime.[4]

In England the legal writers of the thirteenth century said that the crime could be punished by the king's courts by burning.[5] But it was generally left to be dealt with by the ecclesiastical courts; and it seems that it was very seldom that cases occurred before any court, lay or ecclesiastical.[6] In the fifteenth century the witch could be punished under the statutes relating to heresy;[7] and cases, sometimes apparently of a political nature, were brought before the

[1] Lecky, op. cit. i 68, 71.

[2] See a curious work, entitled Pseudomonarchia Dæmonum, of the sixteenth century noted by Lecky, op. cit. i 87 n. 1, in which the names of seventy-two princes of the devils are given, and the number of their subjects estimated at 7,405,926; Sprenger's Malleus Maleficarum collected the most important mediæval treatises in which the current theories of witchcraft were contained; for the most part they were written by inquisitors, Lecky, op. cit. i 68 n. 1.

[3] Ibid 59.

[4] See ibid 87-91 for an account of his book called "Démonomanie de Sorciers."

[5] Fleta p. 54; Britton i 42; P. and M. ii 552.

[6] Ibid 552, 553.

[7] Ibid 553; 2 Henry IV. c. 15.

Council.[1] Witchcraft was the principal charge against Joan of Arc; and a similar charge was brought by Cardinal Beaufort against the duchess of Gloucester in 1441.[2] But there is good reason to think that, even in the fifteenth century, the war against witches was waged less fiercely in England than on the continent. "When there is no torture there can be little witchcraft."[3] But in England, as elsewhere, the Reformation called public attention to the need for its suppression. The first statute on the subject was passed in 1541-1542.[4] It was enacted that it should be felony without benefit of clergy to devise or practise "any invocations or conjurations of spirits witchcrafts inchantments or sorceries," with intent to get or find money or treasure, to waste or consume any person in body member or goods, to provoke unlawful love or any other unlawful act, to find lost or stolen goods; or, in despite of Christ, to pull down crosses. This statute was repealed by the statutes of 1547 and 1553;[5] but in 1562-1563,[6] owing perhaps to the exhortations of bishop Jewel,[7] another statute was passed which made it felony to use exercise or practise any invocations or conjurations of evil spirits to or for any purpose, or to cause by witchcraft the death of another. It was made a misdemeanour to cause by witchcraft harm to body member or goods, or unlawful love, or to pretend by this means to discover treasure. This statute was "neither so severe nor so comprehensive as the canon law"[8] and the continental legislation;[9] and there do not seem to have been many prosecutions under it.[10] But in the following reign the fanatical belief of James I. in the existence of this crime[11] gave rise to more severe legislation and a more active enforcement of the law. An Act of 1603-1604 declared to be felony without

[1] P. and M. ii 553.

[2] Lecky, op. cit. i 101; Stubbs, C.H. iii 136-137; Harcourt, Court of the Lord High Steward 380.

[3] P. and M. ii 553; cf. the views of James I. on the methods for discovering and trying witches, Works 135-136.

[4] 33 Henry VIII. c. 8; the year before the Council had before it a case of necromancy of a semi-treasonable character, Nicholas vii 12, 30, 38; and in the same year there was a case against a physician who had in his possession "instruments of conjuration," ibid 107.

[5] 1 Edward VI. c. 12; 1 Mary Sess. 1 c. 1; but it appears that the Council were prepared to deal with such cases—in 1555 four persons were before it on the charge of "calculing and conjuring," Dasent v 143.

[6] 5 Elizabeth c. 16.

[7] Lecky, op. cit. i 102 n. 2, citing Strype, Annals of the Reformation i 11.

[8] P. and M. ii 553.

[9] Lecky, op. cit. i 98-100, 102, 103.

[10] P. and M. ii 554; Lecky, op. cit. i 103; in 1564-1565 the Council directed the arrest of Agnes Mondaye and a search in her house for "such thynges as may tende to wichecraft," Dasent vii 200, 201; and in 1578-1579 there was an examination of witches at Windsor; they were supposed to have caused death by means of wax images, and it was feared that the Queen was aimed at, Dasent xi 22.

[11] See his three books on Dæmonologia, Works 91-136.

benefit of clergy the invocation of evil spirits, the consultation or rewarding of evil spirits, the taking up of dead bodies to employ any part of them for the purposes of witchcraft, and the use of witchcraft to kill or hurt any person. Further, the use of witchcraft to discover treasure, or to provoke unlawful love, or to injure any person's property, was to be punishable on a first conviction with imprisonment, and on a second as felony.[1]

Somewhat allied to this legislation was that directed against false and fantastical prophecies. The making of such prophecies was declared to be felony in 1541-1542;[2] and after the repeal of this statute in 1547[3] such prophecies were made misdemeanours by statutes of 1549 and 1562-1563.[4] The reason for the enactment of these two latter statutes, and probably of the first-named also, was the fact that these prophecies were made for the purpose of stirring up rebellion.[5]

(*g*) *Miscellaneous.*

The legislation dealing with the poor law, with the coinage, and with the regulation of industry and commerce gave rise to a certain number of new felonies.[6] For instance a statute of 1552, re-enacting statutes of Edward IV. and Henry VII.'s reigns, made it felony to export gold and silver.[7] Egyptians who refused to leave the country within a specified time were declared felons.[8] Unlicensed begging on a third conviction, and returning to England after having been banished as a dangerous rogue, were similarly treated.[9] A short-lived statute of 1545 made it felony to make and leave in a public place anonymous writings accusing persons of treason.[10] Statutes of 1554 and 1558 had made it a misdemeanour to speak or write with a malicious intent false and slanderous words of the king or queen.[11] In 1580-1581[12] writing

[1] 1 James I. c. 12; we shall see that there were witch trials in the latter half of the seventeenth century; but, though no less a person than Hale, C.B. believed in the existence of witches, this belief was then on the decline, vol. vi c. 8; on the whole subject see Foxcroft, Life and Letters of Sir G. Savile ii 493 n. 2.

[2] 33 Henry VIII. c. 14.

[3] 1 Edward VI. c. 12.

[4] 3, 4 Edward VI. c. 15; 5 Elizabeth c. 15.

[5] We get a parallel in the legislation of the Roman Empire; Lecky, op. cit. i 18, 19, tells us that in the later period of pagan Rome the laws against magic were revived not on religious, but on political grounds—"under the head of magic were comprised some astrological and other methods of foretelling the future; and it was found that these practices had a strong tendency to foster conspiracies against the emperors. The soothsayer often assured persons that they were destined to assume the purple, and in that way stimulated them to rebellion. By casting the horoscope of the reigning emperor, he had ascertained, according to the popular belief, the period in which the government might be assailed with most prospect of success; and had thus proved a constant cause of agitation."

[6] Above 392 seqq., 331-332, 335.

[7] 7 Edward VI. c. 6.

[8] 1, 2 Philip and Mary c. 4.

[9] 14 Elizabeth c. 5; 39, 40 Elizabeth c. 4. 1, 2 Philip and Mary c. 3; 1 Elizabeth c. 6.

[10] 37 Henry VIII. c. 10.

[12] 23 Elizabeth c. 2.

such words was declared to be felony, and speaking such words was declared to be felony on a second conviction. It was further made felony to cast the queen's nativity, to prophesy the duration of her life, or to foretell the successor to the throne and the changes which would take place on her death. The Act was to last during the life of the Queen, and during its continuance the Acts of 1554 and 1558 were repealed.

(3) *Misdemeanour.*

We have seen that in the latter part of the mediæval period the criminal law was unable to prevent many forms of atrocious wrong to person and property.[1] This was due mainly to two causes. In the first place the weakness of the executive had paralysed the efficient working of the existing rules of the criminal law. In the second place the law itself was defective. No doubt in most cases an injured person could take proceedings for trespass;[2] and trespass, as we have seen, was a remedy of a quasi-criminal nature.[3] But owing to the weakness of the executive the civil aspect of trespass had developed at the expense of its criminal aspect. The injured individual was left to remedy any wrong he had suffered by suing for damages; and owing partly to the manner in which the sheriffs, juries, and other subordinate officers of justice could be corrupted or terrorized, partly to the unscrupulous use which was made of a vicious system of procedure, such a remedy was worse than useless. In the sixteenth century these defects were met in two ways. Firstly by a large extension of the criminal jurisdiction of the Council, and secondly by large statutory extensions of the criminal law. With the contributions made to the growth of the criminal law by the extension of the jurisdiction of the Council I shall deal more fully in a later chapter.[4] I am here chiefly concerned with the manner in which its sphere was extended by statute.

The statutory extensions of the spheres of treason and felony were accompanied by similar statutory extensions of the sphere of misdemeanour. These statutory extensions emphasized the criminal side of trespass; consequently it is from this century onwards that the term trespass tends to be applied only to wrongs redressible by a civil action, while the term misdemeanour is appropriated to describe wrongs under the degree of treason or felony which are redressible by a criminal prosecution. In some cases of course an injured person could, and still can, elect which manner of proceeding he will adopt. In other cases the sixteenth

[1] Vol. ii 415-416.
[2] Vol. iii 317-318, 370-371.
[3] Vol. ii 364-365.
[4] Vol. v 167 seqq.

century statutes gave both a civil and a criminal remedy. The legislation as to forgery and damage to property[1] affords examples. But, with the development of the criminal law, it was inevitable that the scope of and principles applicable to the law of tort should become more sharply differentiated from the scope of and the principles applicable to the criminal law. Moreover the development of the law of procedure and pleading tended to widen the difference. The criminal procedure, whether applied to the felonies or to offences under the degree of felony, tended to fall apart from the civil procedure applicable to trespass, and the many offshoots of trespass, which were beginning in this period to show signs of overrunning the whole field of common law jurisdiction. Thus the creation by the legislation of this period of a large number of offences under the degree of felony, which were punishable on indictment by a strictly criminal procedure, gave to the misdemeanour the more precise meaning and the importance which it still possesses in our criminal law. Just as the developments which I have described in the law of treason and felony show that the state had mastered the lawlessness which had reduced it to impotence in the fifteenth century; so, the continuous increase in the number of the misdemeanours created by statute, from the sixteenth century onwards, shows that it was prepared to exercise a constantly increasing control over all departments of the national life through the machinery of the criminal law.

I have already touched upon some of these misdemeanours in describing the additions made to the list of felonies during this period. They are often less heinous forms of the same offence, or, in some cases, the same offence committed for the first time.[2] Thus we get in the case of the misdemeanours as in the case of the felonies a number of offences connected with the poor law, with vagrants, with the regulation of trade, with the preservation of game, with religion,[3] and with the safety of the state.[4] Similarly Edward VI.'s legislation as to riot, which created new varieties of treason and felony, created also new misdemeanours.[5] Occasionally the creation of a new statutory misdemeanour emphasized rules laid down by royal proclamation—an illustration is a statute of 1592-1593 which restricted the building of small houses in London and Westminster.[6] In other cases quite new

[1] 5 Elizabeth c. 14; 37 Henry VIII. c. 6; 3, 4 Edward VI. c. 5 § 6.
[2] Above 502, 504, 506, 512.
[3] Above 510, 511; and see e.g. 3 James I. cc. 4 and 5; 3 Charles I. c. 3.
[4] See e.g. 7 James I. c. 6, which required a long list of persons to take the oath of allegiance, and provided that those refusing should incur the penalties of a Praemunire.
[5] 3, 4 Edward VI. c. 5 §§ 6 and 12.
[6] 35 Elizabeth c. 6: see above 303 for the proclamations on this subject.

and independent developments of the criminal law were made in this way. With these cases I must deal, as I dealt with the felonies, and consider them under several distinct categories.

(*a*) *Offences against person and property.*

In 1511-1512[1] an attempt to enter a house in a mask or other disguise, or to make an assault or affray on the highway or elsewhere, was punished by imprisonment; and a penalty was imposed on the vendors of these masks. In 1557-1558[2] the abduction of heiresses, being minors under sixteen, without their parents' consent, was made punishable with fine or imprisonment; and a long term of imprisonment was imposed on those who in addition violated or married such heiresses. If the heiress consented, her next of kin were to enjoy the profits of her land during her life. In 1541-1542[3] to obtain falsely and deceitfully chattels or money by false tokens or counterfeit letters was made punishable by the pillory and other corporal penalties. The statute specially saved the civil remedies of those who had been thus deceived. In 1566 cutpurses and pickpockets, who, as the statute said, had "made among themselves as it were a brotherhood or fraternity of an art or mystery," were deprived of the benefit of clergy.[4] Several minor forms of damage to property, such as cutting growing corn, robbing orchards, digging up fruit trees, or breaking fences, were made punishable by fine in 1601;[5] to which list in 1609-1610 was added the burning of moors in certain places at unseasonable times.[6]

(*b*) *Offences against morals.*

At the end of this period we can trace Puritanical influences in legislation directed against profane swearing,[7] and against the profanation of the Lord's day either by doing certain kinds of work,[8] or by meetings of persons for sport out of their own parishes.[9] But a more important and a more permanent contribution to the law, which is probably to be ascribed in part to the same influences, was made by a set of statutes of the early Stuart period which attempted to suppress the prevalent vice of drunkenness. Some of these statutes attempted to effect their

[1] 3 Henry VIII. c. 9.
[2] 4, 5 Philip and Mary c. 8.
[3] 33 Henry VIII. c. 1.
[4] 8 Elizabeth c. 4; cf. Aydelotte, op. cit. 94-97.
[5] 43 Elizabeth c. 7.
[6] 7 James I. c. 17.
[7] 21 James I. c. 20; for a bill of 1610 which was dropped in the House of Lords see Hist. MSS. Com. 3rd Rep. 13.
[8] 3 Charles I. c. 2.
[9] 1 Charles I. c. 1.

object directly, and imposed penalties for drunkenness.[1] But most of them followed precedents set by statutes of Henry VII. and Edward VI.'s reigns,[2] and attempted to effect their object indirectly. They gave the justices of the peace power to suppress ale-houses where drunkenness or disorderly conduct was permitted, and some of them subjected the keepers of these ale-houses to penalties if they permitted drinking contrary to their provisions.[3] But this legislation was not found to be satisfactory. The justices were careless and offenders were not punished;[4] while the device of granting a patent to certain persons to see that the law was enforced[5] failed owing to the corruption of the patentees[6] and the opposition of Parliament.[7] The judges resolved in 1625 that the statutes in force did not prevent any one who wished from opening an ale-house.[8] The justices could suppress an ale-house which proved to be a nuisance; they could not prevent it from being opened.[9] It was probably in consequence of this resolution that in 1627 the legislature made a new departure and required all ale-houses to be licensed.[10] It thus inaugurated what was destined to become a very special and a very complicated branch of the law.

(*c*) *Perjury.*

It is in this period that the offence of perjury begins to assume its modern form, partly through the action of the legislature, and partly through the action of the courts. In order to understand that form it is necessary to say a few words as to its earlier history.

We have seen that the only form of perjury punished by the common law was the perjury of a jury.[11] For this the common law provided the writ of attaint.[12] Perhaps this limitation of the sphere of the crime was reasonable in the days when juries were as much witnesses to as judges of the facts

[1] 4 James I. c. 5; 7 James I. c. 10; 21 James I. c. 7; 1 Charles I. c. 4; an Act similar to 21 James I. c. 7 was passed in both Houses in 1621, but did not receive the royal assent, Hist. MSS. Com. 3rd Rep. 22.

[2] 11 Henry VII. c. 4; 5, 6 Edward VI. c. 25.

[3] 1 James I. c. 9; 7 James I. c. 10; 21 James I. c. 7; 1 Charles I. c. 4.

[4] Gardiner, op. cit. iv 5; see James I.'s Works 566.

[5] For this device see above 357-359.

[6] Gardiner, op. cit. iv 42.

[7] Ibid 110.

[8] Resolutions concerning Inns, Hutton's Rep. 99, 100.

[9] "How and by what way or means the multitude of inns might be prevented by being suppressed . . . or how the number might be stinted. This point seemed to be difficult, and to contradict the resolution upon the first question (i.e. the resolution that any one might open an inn); and therefore it was agreed that they should advise concerning it; and the best way is, that they be strictly enforced to keep the assise, and not to suffer any to tipple in their inns; and by this way they would desist from their trade," ibid 100.

[10] 3 Charles I. c. 4.

[11] Vol. iii 400; P. and M. ii 529-541.

[12] Vol. i 337-339.

at issue.[1] But, when the jury changed its character, it soon appeared that there was a large gap in the law. It is true that the ecclesiastical courts could punish perjury.[2] But their jurisdiction was ineffective for two reasons. In the first place they were constantly hampered by writs of prohibition because they often used this jurisdiction, as they used their jurisdiction over *laesio fidei*, to gain cognizance of cases concerning land or contracts to which they were not entitled.[3] In the second place, as they naturally regarded the offence from the moral point of view, their treatment of it, even if they had been allowed by the lay courts to deal with it as they pleased, would hardly have resulted in any workable rules of law. It would have suffered from the opposite defect to that from which the common law suffered, because it would have been too wide to be practically effective. The common law was right when it limited the sphere of punishable perjury; but the nature of the limitation required to be recast in the light of the new developments which were taking place in the machinery of the courts. Seeing that the jury were fast ceasing to be witnesses, the procedure by writ of attaint was becoming obviously inapplicable to them. But these juries were led by evidence written or oral. It was upon such evidence that the courts outside the sphere of common law jurisdiction had always acted; and it was assuming an increasing importance in the common law courts. Therefore, just as it had become necessary to deal with the forgery of written evidence,[4] so it had become necessary to deal with perjured oral evidence. In the case of perjury, as in the case of forgery, the Star Chamber led the way; and therefore the origins of our present law of perjury must, like the origins of our present law of forgery, be sought for partly in the jurisdiction assumed by the Star Chamber and partly in the legislation of this period.

It is clear from the account which Hudson gives of this branch of the jurisdiction of the Star Chamber[5] that that court assumed power to punish practically all kinds of perjury committed by anyone in the course of legal proceedings. It extended not only to witnesses but also to presentments made and indictments found at courts leet and courts baron,[6] and possibly also to false oaths made by compurgators.[7] It did not extend to false oaths made by jurors upon which attaint lay, as this case was sufficiently dealt

[1] Vol. i 339-341.
[2] P. and M. ii 541; Stephen, H.C.L. iii 243.
[3] Y.B. 2 Hy. IV. Trin. pl. 40; cf. Y.B. 2 Hy. IV. Mich. pl. 45.
[4] Above 501-503.
[5] Star Chamber, Part II. § vii.
[6] Hudson 74.
[7] Ibid 79, "I have heard it often moved, whether a man swearing falsely upon a wager of law, it were punishable in the Star Chamber? And although I have not judged in the point, yet I daresay it is there punishable."

with by the common law.[1] Nor did it extend to a false oath as to the remembrance of a fact;[2] but apparently it did extend to a false oath as to a person's belief.[3] The chief limitation which the court imposed on its jurisdiction arose from a well-founded fear that too great severity might discourage the production of necessary testimony. Just as at the present day the burden of proof in an action for malicious prosecution is made to weigh heavily upon the plaintiff because the prosecution of a criminal is a public duty, so it was felt to be expedient so to mould the law as to perjury that honest witnesses would not be discouraged from coming forward to testify. Thus the court would hear no case of perjury in respect of pending proceedings;[4] and at one period it hesitated to deal with perjured witnesses when the verdict had passed according to the evidence,[5] or with allegations of perjury made against witnesses for the crown.[6] But, when Hudson wrote, both these last two limitations had disappeared. All that was left of them was the rule, against which he protested, that "perjury committed against the life of a man for felony or murder" when the accused was convicted, was not examinable or punishable.[7]

In the earlier part of the century the legislature did little to remedy the inadequacy of the common law. In 1495 it improved the remedy against the perjured jury;[8] and in the same year it passed two other acts against perjury. The first[9] provided that, even if the jury were acquitted in the proceedings taken by writ of attaint, a further enquiry might be taken as to whether any of the jury had been guilty of corrupt practices; and penalties were imposed upon jurymen so corrupted, and upon the plaintiffs or defendants who had corrupted them. The second[10] was a short-lived act, which gave the chancellor, treasurer,

[1] Hudson 76—"but the imbracery, corruption, and instruction of jurors is here examinable."

[2] Ibid 81, 82.

[3] Ibid 80, "It may be thought strange that a man deposing truth should be punished for perjury, and yet it is most certain; for in the case of *Vernon versus North*, a man was charged by persuasion to have deposed the value of cattle which he never saw; and that was held to be perjury although he deposed the truth."

[4] Ibid 80; cf. Lord Beauchamps v. Sir R. Croft (1569) Dyer 285a for a similar decision that an action of scandalum magnatum would not lie for bringing an action for forging deeds against a peer, more especially while the writ was pending.

[5] Ibid 74—"because . . . bills of perjury grew very frequent against witnesses, in all cases when a verdict was passed, to work a revenge or draw a composition;" however, after the statute of Elizabeth, the common law judges did not act on this principle, and the Star Chamber followed their lead.

[6] Ibid 77.

[7] Ibid 81; attempts to remedy this defect in the law by legislation in 1694 and 1701-1702 failed, see House of Lords MSS. i no. 860, iv no. 1712; the main reason for their failure seems to have been the fear of discouraging prosecutions; see R. v. Macdaniel (1756) 1 Leach 44.

[8] 11 Henry VII. c. 24; supplemented by 23 Henry VIII. c. 3; and made perpetual by 13 Elizabeth c. 25; vol. i. 342.

[9] 11 Henry VII. c. 21. [10] Ibid c. 25; it expired in 1504; below 518 and n. 8.

and justices power to punish perjuries committed by officials, or juries, or by those who gave or submitted evidence before the Council or the Chancery. In 1540[1] various offences connected with litigation were penalized, including subornation of perjury; but it was not till 1562-1563[2] that the first comprehensive statute was made. It provided penalties for persons guilty of perjury or subornation of perjury in the giving of evidence before the Chancery, the Star Chamber, the court of Requests, or any other court which by the king's commission could hold a plea concerning any land, all courts of record, courts leet, courts baron, hundred courts, courts of ancient demesne, and the Stannary courts. It did not extend to perjured evidence before the ecclesiastical courts; and it saved the existing powers to punish perjury conferred by Henry VII.'s statute upon the chancellor and "others of the Kinges Counsell" which were usually exercised in the Star Chamber, and the powers exercised by the Councils of Wales and the North. In order that the statute might not have the effect of making it difficult for litigants to procure testimony it was provided that all witnesses who, on being duly summoned, failed to appear, should be liable to pay a fine, and to compensate the party to the action thereby damaged.[3]

After the passing of this statute some difficult questions arose as to the relation between the kinds of perjury which fell within its provisions, and the kinds of perjury, which, though not falling within its provisions, were punishable by the Star Chamber. It would appear from *Onslowe's Case*[4] that, shortly after the passing of the statute, some of the judges were of opinion that the only perjury punishable by any court was perjury which fell within the statute. The saving clause at the end of the statute they treated as meaningless. They pointed out that it could apply only to the Acts of 1487[5] or 1495;[6] that the first gave no power to punish perjury, and that the second had expired. But this view did not prevail. Both Hudson[7] and Coke[8] agreed in the view, expedient rather than historically sound,[9] that perjury was an offence known to the common law, which could therefore be

[1] 32 Henry VIII. c. 9. [2] 5 Elizabeth c. 9.

[3] But apparently it was sometimes necessary to get a special summons from the Council to induce witnesses to attend, see Dasent xxiv 11, 12 (1592-1593).

[4] (1566) Dyer 242b, 243a.

[5] 3 Henry VII. c. 1—Pro Camera Stellata.

[6] 11 Henry VII. c. 25. [7] Star Chamber 72, 73.

[8] Third Instit. 164, "When you have read the case in Mich. 7 and 8 Eliza. (Onslowe's case) you will confess how necessary the reading of ancient authors and records is, and the continual experience in the Star Chamber is against the opinion conceived there. And Mich. 10 Jac. in the Star Chamber, in the case of *Rowland Ap Eliza.*, it was resolved that perjury in a witness was punishable by the common law;" it was perhaps thought that the Act of 1495 was revived by the saving clause in Elizabeth's Act.

[9] Stephen, H.C.L. iii 246.

punished either by the common law courts or by the Star Chamber, even though it did not fall within the provisions of the statute. Thus perjury committed before the ecclesiastical courts, which was specially excepted from the statute of Elizabeth, was punishable certainly by the Star Chamber,[1] and probably also by the common law courts.[2] The immediate result was that the wide jurisdiction of the Star Chamber continued to be exercised; and the ultimate result was that the principles which the exercise of that jurisdiction had established were imported into the common law.

Thus the offence of perjury, as it existed at the close of this period, was shaped partly by the legislature, partly by the common lawyers, and partly by the Star Chamber. The legislature had definitely penalized certain cases of false swearing. The common lawyers and the Star Chamber had agreed that certain other cases were also punishable. And in determining what other cases were thus punishable we can trace the influence of ideas coming from both these jurisdictions. Thus the rule laid down by Coke that the false oath must be material to the issue[3] is probably, as Stephen says, "an adaptation of the old law of attaint."[4] Attaint did not lie for falsely finding facts not in issue; and therefore, by analogy, a false oath as to facts not material to the issue was not and is not punishable. On the other hand, the fear that too great severity might discourage witnesses, which had tended to limit the jurisdiction of the Star Chamber, was probably the origin of the decisions, that the oath must be administered in the course of a judicial proceeding,[5] and that no action on the case for damages could be brought by a person who had suffered by a perjury.[6]

[1] Hudson 74—he seems to think that, as all depositions there are *ut credit*, and as the perjury was therefore to be as to the belief, proceedings on it could only be taken in that court.

[2] Coke admits, Third Instit. 164, that perjury not grounded on the statute is "most commonly" punished in the Star Chamber; but it would seem that he considered that, in theory at least, the common law courts had jurisdiction; it was decided in 1671 that they had, 1 Sid. 454.

[3] "Perjury is a crime committed, when a lawful oath is ministered by any that hath authority, to any person, in any judicial proceeding, who sweareth absolutely and falsely in the matter material to the issue, or cause in question," Third Instit. 164; cp. R. v. Griepe (1698) 1 Ld. Raym. 256.

[4] H.C.L. iii 249.

[5] Third Instit. 166, "For though an oath be given by him that hath lawful authority and the same is broken, yet if it be not in a judicial proceeding, it is not perjury punishable by the common law or by this Act, because they are general and extra judicial . . . as general oaths given to officers or ministers of justice, citizens, burgesses or the like."

[6] Damport v. Sympson (1597) Cro. Eliza. 520—"If this action should be allowed the defendant might be twice punished, viz. by the statute and by the action, which is not reasonable;" Eyres v. Sedgewicke (1621) Cro. Jac. 601.

(d) Offences connected with officials.

In this, as in the preceding period, there are a certain number of statutes passed to prevent the misdeeds of such officials as sheriffs, and their officers,[1] escheators,[2] and tax collectors.[3] The most significant and the most novel of these statutes is an Act of 1551-1552 for the prevention of the sale of offices.[4] It is significant of the growth of the modern state and of modern political ideas; and it introduces a principle which was wholly opposed to the feudal confusion of office and property. The Act imposed penalties upon anyone buying and selling, or agreeing to buy or sell, or directly or indirectly taking or agreeing to take any profit, by reason of an appointment to offices connected with the administration of justice, the management of the revenue, the keeping of towns, castles, or fortresses, or clerkships in courts of record. Certain offices in the gift of the chief justices of the king's bench and common pleas and the judges of assize were saved; and we have seen that it was not till the beginning of the last century that the ideal aimed at by the framers of the statute was realized.[5] But, when all deductions have been made, we cannot but regard it as a piece of legislation which shows that the transition from mediæval to modern ideas was being rapidly accomplished.

(e) Offences connected with the abuse of the procedure of the courts.

There are a few laws directed against the practices which had in the preceding period reduced to impotence the ordinary process of the law. In 1487[6] the Act "Pro Camera Stellata" was passed to deal with the evils which arose from maintenance, embracery, and giving of liveries; and another Act of the same year was passed to prevent the retainer by other persons of the king's officers and tenants.[7] In 1495 it was enacted that if the leaders of riots, which, as the Act says, were often made by servants or retainers, did not appear in obedience to a proclamation of the justices of the peace, they should stand convicted;[8] and in 1503-1504 heavy penalties were imposed on those who kept retainers otherwise than for the purposes of domestic service.[9] The vigilance and the growing power of the Tudor Council gradually rendered a repetition of these enactments

[1] 11 Henry VII. c. 15; 29 Elizabeth c. 4; 43 Elizabeth c. 6.
[2] 1 Henry VIII. c. 8.
[3] 34, 35 Henry VIII. c. 2.
[4] 5, 6 Edward VI. c. 16; see vol. i 250.
[5] See vol. i 262-264.
[6] 3 Henry VII. c. 1; vol. i 493-495.
[7] Ibid c. 12.
[8] 11 Henry VII. c. 7.
[9] 19 Henry VII. c. 14.

against retainers unnecessary. But the other and less violent methods of abusing legal procedure were still rampant. A statute of 1540[1] imposed fresh penalties on maintenance, champerty, embracery, and, as we have seen, subornation of perjury.[2] Further, it penalized the buying and selling of any pretended titles to lands, tenants, or hereditaments, unless the vendors had been seised or possessed of an estate in possession in the land, or of an estate in reversion or remainder, or had taken the rents and profits thereof, for a year before the sale.[3] But here again the steady pressure exerted by the Council effected an improvement which the long series of mediæval statutes and the efforts of the common lawyers had been unable to effect.[4] We shall see that this work was assisted by some of the statutes which removed abuses or effected improvements in the procedure of the common law courts.[5]

(4) *Topics connected with criminal law and procedure.*

The legislation of this period made a few modifications in certain topics connected both with the substantive law and with procedure which deserve a brief mention.

The substantive law.

(*a*) *The hue and cry.*

It was an old and salutary principle of the criminal law that, if a robbery or other felony was committed, the inhabitants of the hundred where it was committed were liable for the damages sustained by the person injured by the crime, unless they raised the hue and cry, and captured the criminal within forty days.[6] Such a system required the active co-operation of hundred with hundred. But it was found that the neighbouring hundreds were negligent in performing this duty, as they did not stand to lose in the event of failure to catch the criminal.[7] Apparently also it was the custom to levy the damages from the most solvent inhabitants of the hundred, who had no means of recouping themselves from their fellow-inhabitants.[8] The result was that criminals were negligently pursued; and the penalty for this neglect of duty fell upon a few individuals arbitrarily selected.

[1] 32 Henry VIII. c. 9. [2] Above 518.

[3] See Partridge v. Strange (1553), Plowden 77; and cf. Jenkins v. Jones (1882), 9 Q.B.D. 128.

[4] Vol. i. 334-335; vol. ii. 416, 457-459; vol. v 201-203.

[5] Below 524, 534, 535-536.

[6] Vol. i 294; vol. iii 599-604; 13 Edward I. st. 2 cc. 1 and 2; 28 Edward III. c. 11.

[7] 27 Elizabeth c. 13 preamble. [8] Ibid § 3.

It was therefore enacted in 1584-1585[1] that the inhabitants of every hundred, who neglected to make fresh suit, after the hue and cry raised, should be liable for half the damages recoverable against the hundred where the crime had been committed. These damages were to be recovered by action brought in the name of the clerk of the peace of the county. The amount of any damages payable by the hundreds under this statute, or the older statutes imposing liability, was to be raised by a rate made by the justices of the peace, and assessed by the constables. The constables were to pay the money to the justices, who were to pay it over to the persons entitled to be indemnified. If one of several offenders were arrested, no damages were payable; and the party complaining must give notice at the nearest town of his loss as soon as possible, and must sue for compensation within a year.

(*b*) *Market overt.*

With the rule of the law merchant that a sale of goods in market overt passes the property to a purchaser, even though the vendor had no title to them, I shall deal when I come to consider the development of the law merchant during this period.[2] We shall see that at this period, if not earlier, it had become a part of the common law. But in the case of stolen goods it was subject to the right of the owner to get a writ of restitution if he had procured the conviction of the thief;[3] and the legislature found it necessary to modify the rule in the case of sales of horses, owing to the ease with which a stolen horse could be carried off and disposed of in a distant market. Two Acts of 1555[4] and 1588-1589,[5] which are still in force, prescribe certain formalities for the sale of horses in markets, non-compliance with which renders the sale void. Even if these formalities are complied with, the owner of a stolen horse may, if the horse has been sold within six months of the theft, if claim has been made by the owner within the same period, and if proof of ownership has been given within forty days of the claim, recover the horse, on payment to the purchaser of the price at which he bought.

Certain other statutory changes connected with the criminal law I have already mentioned, so that it is only necessary to catalogue them in order to complete this sketch of the changes

[1] 27 Elizabeth c. 13; by 39 Elizabeth c. 25 the hundred of Benherst, within which lay Maidenhead thicket—a place notorious for robberies—was allowed to throw the whole damages on the neighbouring hundreds which had been negligent in pursuit. Gad's Hill had a similar reputation, see (1577) 2 Leo. 12—a case which may have suggested the scene in Henry IV. Pt. I.

[2] Vol. v 98-99, 105, 110-111.

[3] Vol. ii 361; below 523.

[4] 2, 3 Philip and Mary c. 7.

[5] 31 Elizabeth c. 12.

made in the substantive part of this branch of the law. We have seen that the changes in the character of the Benefit of Clergy, which ended by making it a complicated series of rules exempting certain persons from punishment for certain felonies, began with the legislation of this period;[1] and that Henry VIII.'s legislation as to Sanctuary paved the way for the abolition of this institution in 1623-1624.[2] Statutes of 1535 and 1536[3] substituted the common law for the civil law procedure in the cases which fell within the criminal jurisdiction of the court of Admiralty. The decay of the appeal of larceny was completed by the statute which gave to the owner of stolen property a writ of restitution, if the thief was convicted on indictment by the help of the evidence of the owner of the stolen goods or of the person from whom they had been taken.[4] The efficiency of the criminal law was increased by the statute which allowed those accused of murder to be indicted at once, without waiting to see if the relatives of the murdered man would bring their appeal.[5] The strictness of the older law, and the advent of more modern notions of criminal liability, are illustrated by the fact that it was thought necessary in 1532-1533 to pass a statute to declare that no forfeiture should be incurred by a person who killed another who was attempting to rob or murder him in his house or on or near the highway, or who was attempting to commit burglary.[6]

Procedure.

The statutory changes connected with criminal procedure can be grouped under the following heads: (i) changes which gave advantages to the crown; (ii) changes which gave advantages to the subject; and (iii) changes which made for the greater efficiency of the law.

(i) *Changes which gave advantages to the crown.*

The first of these changes was brought about by two statutes of Henry VIII.'s reign which made certain alterations in the procedure on trials for treason. The earlier of these two statutes was passed in 1541-1542.[7] It set forth the inconvenience of the rule which required persons to be tried in the county in which the offence was committed; and enacted that if, after

[1] Vol. iii 299-302.

[2] Ibid 306-307; 21 James I. c. 28 § 7; for some account of the criminal quarters of Elizabethan London, sometimes miscalled sanctuaries, see Aydelotte, op. cit. 82-83; some existed till the end of the seventeenth century, vol. vi c. 8.

[3] 27 Henry VIII. c. 4; 28 Henry VIII. c. 15; vol. i 550; above 260.

[4] 21 Henry VIII. c. 11; vol. ii 361.

[5] 3 Henry VII. c. 1; vol. ii 362.

[6] 24 Henry VIII. c. 5; vol. iii 312.

[7] 33 Henry VIII. c. 23.

examination before the Council, a person confessed or was vehemently suspected of treason or murder, he might be tried anywhere within the kingdom. It also enacted that no peremptory challenge should be allowed in trials for treason. This statute was repealed by the clause of the statute of 1554[1] which enacted that all trials for treason should be according to the course of the common law.[2] The later of these statutes was passed in 1543-1544,[3] and is not affected by the statute of 1554.[4] It recites that doubts had arisen whether treason committed abroad could be tried in England, and enacts that such treasons shall be tried in the King's Bench or before special commissioners in any county in England. It was settled in *Story's Case*[5] that this statute was not repealed by the statute of 1554, either because such treason, not being triable at common law, was not affected by an Act which provided only for treasons so triable;[6] or because such treason was triable at common law in any county in England.[7]

The second of these changes is connected with an extension of the procedure by way of criminal information which was effected in 1495.[8] A statute passed in that year gave power to the judges of Assize and the justices of the peace to bring to trial persons accused of misdemeanours upon an information instead of upon an indictment. This statute is of some importance in the somewhat obscure history of this form of criminal proceeding. I shall deal with the controverted question of its historical significance in that connection.[9]

Under this head we may note the earliest of the Statutes (now represented by the Public Authorities Protection Act) passed to give certain procedural advantages to justices of the peace and other officers of the local government, when sued for acts done in the execution of their office.[10]

[1] 1, 2 Philip and Mary c. 10.
[2] Coke, Third Instit. 27; (1555) Dyer 132a.
[3] 35 Henry VIII. c. 2.
[4] (1555) Dyer 131b.
[5] (1571) Dyer 298b, following the resolution of 1555, ibid 132a.
[6] "And it seems that notwithstanding this (i.e. 1, 2 Philip and Mary c. 10) the statute 35 Hy. VIII. c. 2 is in force, because no offence of treason committed out of the realm was triable here by the course of the common law, therefore this statute enlarges the power and authority of the trials of the realm in this point; but for treason committed in a foreign country, and triable in B.R. or in any county at the pleasure of the king, by statute 33 Hy. VIII. c. 23, it seems otherwise; because this treason by course of law was triable in the county where the offence was committed," Dyer 132a; cf. Foster's Case (1615) 11 Co. Rep. at p. 63a.
[7] Hale, 1 P.C. 169, 170—"At common law he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any;" cf. The Case of the Admiralty (1610) 13 Co. Rep. at p. 54; Pt. II. c. 5 § 1.
[8] 11 Henry VII. c. 3.
[9] Pt. II. c. 7 § 2.
[10] 7 James I. c. 5; 21 James I. c. 12.

(ii) *Changes which gave advantages to the subject.*

I have already mentioned the statutes which effected certain improvements in the procedure upon trials for treason,[1] and those dealing with proceedings taken by common informers.[2] Small changes were also made in favour of sheriffs in relation to proceedings taken upon their accounts with the king,[3] in favour of crown tenants who had been vexed by informations of intrusion,[4] and to remedy certain abuses connected both with the obtaining of process to keep the peace by one subject against another, and with the removal of indictments for riots and other offences into the superior courts.[5] The only other change of any importance was made by statutes of Henry VIII.'s and Elizabeth's reign,[6] which abolished the maxim *nullum tempus occurrit regi* in the cases to which they applied. Elizabeth's statute, which replaced that of Henry VIII., fixed two years as a period of limitation for actions, informations, or indictments on penal statutes brought by the king, and one year if these proceedings were brought by a common informer suing either for himself only or for himself and the king.[7]

(iii) *Changes which made for the greater efficiency of the law.*

These changes affected the law as to bail, as to the preliminary examination of the accused, as to venue, and as to formal errors in indictments.

Bail. It may be that in early days those who offered themselves as security for the appearance of an accused person were literally bound body for body.[8] But in the thirteenth century these sureties were only liable to amercement if they allowed their prisoner to escape.[9] Later it became usual, either to make the surety promise by recognizance to pay a sum certain in the event of the non-production of the prisoner; or, combining the older idea of the nature of the surety's obligation with the newer means taken to enforce it, both to make him promise by

[1] Above 499. [2] Above 356-357.
[3] 21 James I. c. 5. [4] Ibid c. 14. [5] Ibid c. 8.
[6] 7 Henry VIII. c. 3; 31 Elizabeth c. 5; there was an earlier temporary Act, 1 Henry VIII. c. 4, which was probably caused by the vexatious use which Empson and Dudley had made of these proceedings, above 26-27.
[7] The informer sues "tam pro domino rege quam pro se ipso," and hence the proceedings are called "qui tam" proceedings, Bl. Comm. iii 160.
[8] P. and M. ii 587 and authorities there cited; Holmes, Common Law 249, 250; Hale, P.C. ii 125; vol. ii 84, 104. Both Maitland, H.E.L. ii 587 n. 6, and Coke, Fourth Instit. 178, cite the Ancienne Coutume of Normandy in which the sureties are described as "the Duke's living prison;" and Maitland points out that, conversely, a prison is sometimes spoken of as a pledge or surety, citing Select Pleas of the Crown (S.S.) pl. 197.
[9] P. and M. ii 588.

recognizance to pay a sum certain in the event of his non-production, and to commit the accused to the surety's custody.[1] If the accused was thus committed to the custody of the surety he was strictly and technically his bail; if the surety merely gave security for his appearance he was said to give mainprize and to be a mainpernor.[2]

From an early period the sheriff had a large discretion as to taking or refusing to take bail or mainprize. In the twelfth century it would seem that the only cases in which he could not take bail or mainprize were cases in which an accusation of homicide had been made.[3] The writ by which the sheriff could be compelled to release the prisoner on bail or mainprize was the writ *de homine replegiando;*[4] and, when that writ attained its final form, the list of cases in which bail must be refused had grown by the addition of offences against the forest law, and arrest by the special command of the king.[5] Further it would appear that the sheriff was given a wide power to refuse bail in cases where by the law of England bail ought to be refused. These cases were taken to include treason, and sometimes any crime punished by death or mutilation.[6] But the law was in a very uncertain state; and this uncertainty put too much power into the hands of the sheriffs. In 1275 the main foundations of the modern law were fixed by one of the clauses of the Statute of Westminster I.[7] That statute enumerated the offenders who were not bailable, and the offenders who might be released on bail. The offenders not bailable included outlaws; those who had abjured;[8] approvers;[9] those caught with the stolen property upon them; those guilty of prison breach; known thieves; those appealed by approvers; those accused of arson, coining, counterfeiting the king's seal, treason touching the king's person, or of open misdeeds;[10] and excommunicates taken at the bishop's request. The offenders bailable included those indicted of larceny before the sheriffs; those who were but lightly suspected,

[1] This form appears as early as Edward III.'s reign, Fitzherbert, Ab. *tit.* Mainprize pl. 12 and 13.

[2] Pt. II. c. 6 § 3, and authorities there cited; thus Hale (P.C. ii 127), speaking of this more stringent form of liability, says, "It is not only a recognizance in a sum certain, but also a real bail, and they are his keepers, and may be punished by a fine beyond the sum mentioned in the recognizance, if there be cause, and may reseize the prisoner, if they doubt his escape, and bring him before the justice or court, and he shall be committed."

[3] P. and M. ii 582, 583.

[4] Pt. II. c. 6 § 3.

[5] P. and M. ii 583.

[6] Ibid 583.

[7] 3 Edward I. Stat. 1 c. 15; Coke, Second Instit. 185-191; Hale, P.C. ii 127-135; Stephen, H.C.L. i 233-235.

[8] For Abjuration see vol. iii 303-307.

[9] For the approver see ibid 608-609.

[10] As for instance if A dangerously wounds B, Hale, P.C. ii 134.

or accused only of petty larceny, provided that they had not been previously found guilty of larency; those accused of being accessory before or after the fact to a felony;[1] those accused of trespass not punishable with loss of life or member; and those appealed by an approver who had subsequently died. In 1444[2] this statute was supplemented by a provision that the sheriff must, with certain exceptions,[3] release on bail all persons in custody by reason of any personal action, or by reason of any indictment for trespass.

When the latter statute was enacted the power to bail was passing to the justices of the peace. It had perhaps been conferred upon them in certain cases by statutes of Edward III.'s reign;[4] and it was certainly conferred upon them in very general terms by a statute of 1483-1484.[5] With the accession of the Tudors a stricter control over the manner in which the power was used began to be exercised. A statute of 1487[6] recited that persons not bailable were often bailed, whereby many murderers and felons had escaped; and enacted that the power to bail should be exercised by not less than two justices, one of whom was to be of the *quorum*, and that the prisoners whom they bailed should be certified at the next general sessions of the peace or sessions of gaol delivery. It would appear that this statute had not worked altogether satisfactorily. It was stated in 1554[7] that one justice, in the name of himself and another who knew nothing of the case, had sometimes by "sinister labour and meanes" set at large notable offenders. Justices were therefore prohibited from bailing any persons not bailable by the statute of 1275. Prisoners must be bailed in open sessions, and at least two justices, one being of the *quorum*, must be present at the time of the bailment. A certificate must be made to the next sessions of gaol delivery, and the justices of gaol delivery were given power to fine justices for breach of

[1] For the law as to the conditions under which accessories were bailable see Hale, P.C. ii 135 and the Y.BB. there cited.

[2] 23 Henry VI. c. 9.

[3] Persons in prison by reason of condemnation, execution, capias utlagatum or excommunicatum, surety of the peace, those committed by the special command of any justice, and vagabonds refusing to work according to the Statutes of Labourers.

[4] 4 Edward III. c. 2—the sheriffs are not to let to mainprize those indicted or taken by the keepers of the peace if not mainpernable, and the keepers of the peace may punish them if they do; 34 Edward III. c. 1 § 6 gave power to take security or mainprize for good behaviour; for the history of this clause see E.H.R. xxvii 227; neither statute confers the power on the justices very distinctly, but the statute of 1483-1484 certainly assumes that they then had the power to bail those indicted before them, see next note.

[5] 1 Richard III. c. 3—"that every justice of peace . . . have authority . . . to let such prisoners (i.e. those arrested for suspicion of felony) and persons so arrested, in bail or mainprize, in like form as though the same prisoners or persons were indicted thereof afore the same justices in their sessions."

[6] 3 Henry VII. c. 3.

[7] 1, 2 Philip and Mary c. 13.

the provisions of the Act. Later statutes were passed to ensure that bailors should be substantial persons,[1] and to make special provision for bail in the case of particular offences; but the statute of 1275 as to offences bailable, and the statute of 1554 as to the procedure by which bail could be obtained, remained the basis of the law on this subject till 1826.[2]

The preliminary examination of the accused. We shall see that in many continental countries the Reception of Roman law led to the growth of an entirely new form of criminal procedure. For the oral and formal accusation leading up to one of the older modes of proof there was substituted the inquisitorial procedure of the civil and canon law.[3] By the first half of the sixteenth century the development of this procedure had, in most continental countries, resulted in the almost complete disappearance of that liberty of defence which under the older procedure had been allowed to the accused.[4] In England, on the other hand, the development of the jury system had prevented the introduction of this inquisitorial procedure.[5] Thus, in the sixteenth century, the English criminal procedure still retained many mediæval characteristics which made it far more favourable to the accused than the continental system.[6] We shall see, however, that some of the continental ideas were introduced, partly through the practice of the Council and Star Chamber, and partly because even the judges of the common law courts were ready to admit that it was not to the interest of the state to give too many advantages to accused persons.[7] Here I shall deal with the only one of these changes which was introduced by the legislature.

The change which was taking place in the character of the jury was making it quite clear that, in the interests of justice, some sort of preliminary examination of an accused person ought to be established. Juries were ceasing to have a first-hand knowledge of the facts;[8] and just as the knowledge of the petty jury required to be supplemented by the testimony of witnesses, so the knowledge of the grand jury required to be supplemented by evidence which could only be got by a preliminary examination into the causes for suspecting an accused person.

[1] 21 James I. c. 8 § 3—it recites that persons "commonly called Baylers or Knights of the post" cause themselves to be assessed at high rates in the subsidy books or take upon themselves the names of substantial persons in order that they may be accepted for bail.

[2] Stephen, H.C.L. i 238.

[3] Vol. v 170-176; for the older modes of trial see vol. i 299-312; vol. ii 108-110.

[4] Vol. v 174.

[5] Vol. i 304, 317-320; vol. iii 620-622; vol. v 176-177.

[6] Vol. iii 622; and see Pt. II. c. 7 § 2 for a sketch of the later history of criminal procedure.

[7] Vol. v 190-195; Pt. II. c. 7 § 2.

[8] Vol. i 335-336; vol. iii 648-650.

In 1554[1] it was enacted that, on an application for bail, the justices should, in all cases where the prisoner was accused of any manslaughter or felony, before they admitted him to bail "take the examination of the said prisoner and information of them that bring him of the fact and circumstances thereof; and the same, or as much thereof as shall be material to prove the felony, shall put in writing." The examination and admission to bail must be certified to the next sessions of gaol delivery. In all cases where a person was indicted for murder or manslaughter before the coroner, the coroner was to put into writing the material evidence given to the jury; and both the justices and the coroner were given power to bind over the witnesses to appear and give evidence at the trial. The difference between the character of the examination, held by the justices and that held by the coroner is remarkable.[2] It is probably due to the fact that in the former case there was an accusation definitely formulated against some specific person, which must be presented by the grand jury before the prisoner was arraigned; whereas, in the latter case, there was simply an inquiry at large into the facts, resulting in a presentment, on which the accused could be at once arraigned, without the need for any further presentment by the grand jury. The nature of the inquiry and the character of the subsequent proceedings naturally affected the character of the preliminary examination.

The provisions of this statute relating to the preliminary examination before the justices applied only when the prisoner was bailed, because the main object of the statute was to settle the procedure in cases where bail was applied for. But it was clear that some preliminary examination was quite as useful when the prisoner was committed on a charge of manslaughter or felony as when he was bailed. It was therefore enacted in 1555[3] that the examination should be made in this case also.

We have seen that these statutes contemplated an inquisitorial examination of the prisoner, not a judicial enquiry into the facts of the case.[4] They gave, as they were designed to give, the executive some of the advantages against prisoners which were conferred by the inquisitorial procedure of foreign states; and it is not till the reforms of the last century that this examination lost its original character, and became an enquiry of a judicial nature.[5] Such a procedure may seem strange to our modern ideas. But, in the sixteenth century, it was necessary in order to secure the observance of the law and to protect the state against its enemies.

[1] 1, 2 Philip and Mary c. 13; vol. i 296; above 527-528.
[2] See vol. i 296 n. 6; and Hale, P.C. ii 61 there cited.
[3] 2, 3 Philip and Mary c. 10.
[4] Vol. i 296.
[5] Ibid 297.

It would be hardly too much to say that the preservation of the mediæval criminal procedure, based upon the presentment of the grand and the trial by a petty jury, and its adaptation to the needs of the modern state, would hardly have been possible if the practice of examining suspected persons, which had been introduced by the Council, had not been thus extended. In this way the powers given to the executive by these statutes have helped to preserve and develop a unique form of criminal procedure, which, even in the sixteenth and seventeenth centuries, maintained a standard of fairness to the accused unattainable by the inquisitorial procedure of continental states. But with this and other characteristic features of the English criminal procedure I shall deal more fully in the following chapter, and in the second Part of this Book.

Venue.[1] Trial by jury was a trial by those who lived in the neighbourhood of the place where the crime was committed.[2] From this two consequences flowed. In the first place the jury must come from this neighbourhood.[3] In the second place the accused could only be put on his trial in this neighbourhood. Several inconveniences followed from the latter rule. Criminals are often vagrant persons; and the rule that they could not be tried where they were caught was clearly a hindrance to the administration of justice. In the case of larceny this inconvenience had been partially got over by the rule that if a man stole property and carried it about, he was considered to continue to steal it throughout his wanderings, so that he could be tried at any place where he was caught.[4] But this subterfuge was not possible in the case of other crimes. In all other cases the prisoner must be brought back to the place where the deed was done. A much more serious consequence of the rigid application of this doctrine was the fact that it prevented many crimes being tried at all. If A wounded B in one county, and B died in another, A could be indicted in neither county, because the jurors of the county where B died could have no knowledge of the wound, and the jurors of the county where the wound was given could have no knowledge of the death. Again if A stole in one county and conveyed the property to an accomplice in another, the accomplice could not be indicted as an accessory if the principal were convicted, because the jurors of the county where the receipt took place could have no knowledge of a conviction in a foreign county.[5] These two cases were remedied by a statute of 1548,[6]

[1] Stephen, H.C.L. i 276-278. [2] Vol. i 312. [3] Ibid 332.
[4] Hale, P.C. ii 508, citing Y.B. 4 Hy. VII. Pasch. pl. 1.
[5] See the preamble to 2, 3 Edward VI. c. 24, where these cases are stated.
[6] 2, 3 Edward VI. c. 24.

which is the ancestor of a long line of statutes[1] passed to remedy an obsolete rule which still troubles the administration of our criminal law.[2]

Formal errors in indictments. Among the many archaic traits which our criminal law long retained was the extreme precision required in the wording of indictments. This, indeed, was a characteristic of all branches of the law as to pleading.[3] But we shall see that in civil cases several statutes had modified the strictness of the old rules.[4] These statutes did not apply to criminal cases. The legislature was jealous, and at this period rightly jealous, of taking away from an accused person any advantages which were given to him by the common law. The only statutes which in this period were passed to modify the common law rules was a statute of 1545,[5] which enacted that the omission of the words "vi et armis videlicet baculis cultellis arcubus et sagittis and the like" should not annul an indictment; and a statute of 1605-1606 which provided that indictments for recusancy should not be annulled for want of form.[6]

Looking at these changes in the criminal law and procedure as a whole, we can see that the legislature attempted to adapt it, as it adapted other branches of the law, to the needs of the modern state. But we must admit that it did not attain the same measure of success. As compared with the legislation upon other topics it suffered from the fatal defect of a lack of continuity. Much of the legislation of Henry VIII.'s reign gave, it is true, promise of necessary and radical changes in many parts of the criminal law. But, as was inevitable in a time of revolutionary change, it often erred on the side of severity; and, after his death, a return was made to the law in force before his accession, with all its anomalies and imperfections. Men feared, not altogether unreasonably, to extend unduly the sphere of the criminal law. It was clear, however, that some extensions were necessary; and these extensions were made; but they were made tentatively, experimentally, and without any attempt to modify the mediæval basis upon which the law rested. Thus it comes about that the criminal legislation of this period did not adapt mediæval rules to

[1] Stephen, H.C.L. i 277.

[2] "A rule which requires eighteen statutory exceptions, and such an evasion as the one mentioned in the case of theft (above 530 n. 4) is obviously indefensible. It is obvious that all courts otherwise competent to try an offence should be competent to try it irrespectively of the place where it was committed, the place of trial being determined by the convenience of the court, the witnesses, and the person accused," ibid. 278; even Blackstone thought that the strict rules should be departed from "when the great ends of justice warrant," Comm. iii 385.

[3] Vol. ii 105-106; vol. iii 616-620, 633-634; Pt. II. c. 7 § 2.

[4] Below 535-536.

[5] 37 Henry VIII. c. 8.

[6] 3 James I. c. 4 § 10.

their new environment with anything like the success achieved by the legislation which dealt with other sides of the national life; and, seeing that both the good and bad points of the Tudor legislation have had very permanent results upon the whole course of our legal history, English criminal law long suffered, and still to some extent suffers, from its shortcomings.

In some respects, as we shall see, these deficiencies of the statute law were remedied by the action of the courts. It is true that the list of felonies could only be extended by statute. But we shall see that the action of the common law courts was more successful than the action of the legislature in permanently adapting Edward III.'s statute of treasons to modern needs;[1] and that, in the cases of offences under the degree of felony, the action of the Council and the Star Chamber both created new offences and increased the efficiency with which the law prohibiting these offences, new and old, was enforced.[2] The common law courts and the Council and Star Chamber worked together to enforce and to supplement the common law and the amending statutes; and their work had a considerable measure of success.

For the development of the law of tort the legislature did nothing, beyond sometimes giving to the party wronged by one of the new statutory misdemeanours an action for damages. This branch of the law was developed partly by the common law courts but chiefly by the Council and the Star Chamber. When the Council and the Star Chamber lost their English jurisdiction the developments which had originated with them were in many cases adopted by the common law courts. Of these developments I shall say something when I deal with the jurisdiction of the Council and Star Chamber,[3] and with the history of the technical development of the law of crime and tort in this period and the next.[4]

Civil Procedure

The most important statutory innovation in this branch of the law was the introduction of the principle of the limitation of personal actions in 1623-1624. From then to now the statutes of limitation have operated solely through the law of procedure; with the result that in the case of all actions, other than those coming within the scope of the Real Property Limitation Acts,[5] the remedy, not the right, is barred. I shall therefore in the first place deal with the statute of 1623-1624, and then with certain other subjects connected with civil procedure.

[1] Pt. II. c. 5 § 1.
[2] Vol. v 197-214.
[3] Ibid.
[4] Pt. II. c. 5 §§ 2 and 3.
[5] 3, 4 William IV. c. 27; 37, 38 Victoria c. 57.

(i) *The limitation of personal actions.*

We have seen that the principle of the limitation of actions had already made its way into the land law,[1] and into certain parts of the criminal law.[2] But, if we except a temporary Act of 1609-1610 passed to prevent frauds of shop-keepers,[3] it had not been applied to purely personal actions. The Act of 1623-1624,[4] which is still the foundation of our modern law, provided that for most personal actions, the period of limitation should be six years, but that for actions of assault and false imprisonment it should be four years, and for actions on the case for words it should be two years. The Act thus applied to almost all personal actions. But it did not apply to specialty contracts,[5] nor to actions of account between merchants their servants or factors,[6] nor to actions brought for a debt under a special statute,[7] nor to actions brought on a record.[8] It further provided that the statutory period should not run if the plantiff was, when the cause of action accrued, an infant, a married woman, non compos mentis, in prison, or beyond the seas.[9]

(ii) *Other subjects connected with procedure.*

In this period, as in the last, the rules of procedure and pleading were almost entirely shaped and controlled by the courts themselves. We shall see that in the new courts and councils of this period—the court of Admiralty, the Star Chamber, and the court of Chancery—systems of procedure and pleading were in use differing in some respects from one another, and widely divergent from the rules of procedure and pleading known to the common law.[10] But we shall see that these very different systems, though they continued to develop separately on their own lines right down to the period of the Common Law Procedure Acts and the Judicature Acts, exercised some influence upon one another; and that we can probably trace to this reciprocal influence some of the rules of procedure evolved in the Chancery, and some of the changes in the procedure of the

[1] Above 484-485. [2] Above 499, 525.

[3] 7 James I. c. 12—entitled "an act to avoid the double payment of debts;" it provides that a shop book shall not be evidence of a debt after twelve months.

[4] 21 James I. c. 16 § 3. [5] Ibid.

[6] Ibid; as to the meaning of this exception see the notes 6 and 7 to Webber v. Tivil 2 Wms. Saunders at p. 127; Inglis v. Haigh (1841) 8 M. and W. 769; Robinson v. Alexander (1834) 2 Cl. and Fin. 717; the exception was abolished by the Mercantile Law Amendment Act, 19, 20 Victoria c. 97 § 9.

[7] Talory v. Jackson (1639) Cro. Car. 513.

[8] Cf. Jones v. Pope (1666) 1 Wms. Saunders 37, where it is assumed that actions on a record, on a contract under seal, and on a statute, are all specialties and out of the statute.

[9] 21 James I. c. 16 § 7. [10] Vol. v 178-188, 285-287, 302-303.

common law courts.[1] With these large developments in the law as to procedure and pleading I shall deal later. Here I shall only note briefly the chief legislative changes made during this period. These changes were made entirely in the common law rules, probably because the systems employed in the other courts and councils had hardly developed sufficiently to attract the attention of the legislature. But we have seen that during the Middle Ages the common law had evolved an elaborate system, the rules of which were very strict, and often productive both of delay and injustice.[2] Some of these defects the legislature endeavoured to remedy; but its efforts were tentative and the reforms made covered very little ground. I shall deal with these reforms under the following heads:—Process, Pleading, Proceedings in error, Costs, Judicial Machinery.

Process.

We have seen that the rules of process were quite the most irrational part of the common law.[3] Every action had its own process which must be rigidly adhered to.[4] Some small simplifications were made by statutes of 1503-1504[5] and 1531.[6] The former statute assimilated the process in actions on the case to that in trespass and debt; and the latter assimilated the process in actions on Richard II.'s statute of forcible entries to process in trespass, and the process in actions of annuity and covenant to the process in the action of debt. The result was that in all these actions the defendant could be in the last resort outlawed. An Act of 1589[7] provided for due proclamation of an impending outlawry in the county where the defendant resided, and made provisions for ensuring that the summons in a real action was brought to the knowledge of the defendant.

A salutary Act of 1547[8] prevented the discontinuance of suits by the death of the king, by alterations in the commissions of assize or any other commission, or by the failure of the judges to appear at the appointed day. Persons found guilty before judges acting under one commission could be sentenced by judges acting under another later commission. The fact that the plaintiff in an action, or the judge who tried the case, was promoted to any rank or dignity was not to abate the writ.

Three Acts of James I.'s reign dealt with process in execution of a judgment. The first was caused by the question

[1] Vol. v 190-194, 285, 333; Pt. II. c. 7 § 3.
[2] Vol. iii chap. vi § 2.
[3] Ibid 626.
[4] Vol. ii 520-521; vol. iii 623-627.
[5] 19 Henry VII. c. 9.
[6] 23 Henry VIII. c. 14.
[7] 31 Elizabeth c. 3.
[8] 1 Edward VI. c. 7.

of privilege which arose in *Shirley's Case*. It provided that the release of a member of Parliament on the ground of privilege should neither render the sheriff liable for an escape, nor prevent the creditor from suing out a fresh writ of execution when the period of privilege had expired.[1] The second of these Acts provided that if a prisoner were taken in execution and died, the creditor should be able to pursue his remedies against his personal representatives.[2] The third provided that in certain actions execution should not be stayed by suing out a writ of error, unless the party wishing to sue it out would give a recognizance in double the sum recovered.[3]

Pleading.

The painful accuracy with which the common law courts required all the complicated steps in their process to be recorded had, in the preceding period, led to the passing of numerous statutes of "Jeofail."[4] These statutes were designed to remedy the faults, careless or intentional, of the sheriffs, clerks, and other officers of the courts. They did not provide for mistakes made by the pleader in the statement of the case. Perhaps the system of oral pleading, under which the pleadings were settled after an exhaustive debate in court, made such provision unnecessary.[5] But we have seen that a pleading after the term in which it had been enrolled became a record, and therefore subject to all the strict rules as to absolute accuracy which applied to records;[6] and that it was in this period that written pleadings settled by the parties out of court took the place of the oral pleadings settled in court after debate between the opposing counsel.[7] It is clear that this system of written pleadings did not afford the same guarantee as the earlier system that the pleadings enrolled were absolutely accurate. It therefore became necessary to extend the provisions of the statutes of Jeofail to cover, not only errors in process committed by the officers of the courts, but also errors in pleading committed by the advisers of the parties. It appears from a statute of 1540[8] that, even after verdict given, parties could and did insist on formal errors both in pleading and process, and so rendered all the proceedings useless. It was therefore enacted that, after verdict, the judges should proceed to judgment, in spite of mispleading or insufficient pleading, mistakes of process, misjoinder of issue, lack of authority

[1] 1 James I. c. 13. [2] 21 James I. c. 24. [3] 3 James I. c. 8.
[4] Vol. ii 475 n. 9; for the meaning of the term "Jeofail" see vol. i 227 n. 5; for the history of this legislation see Pt. II. c. 7 § 2; and cp. Bl. Comm. iii 407-410.
[5] Vol. iii 635-637. [6] Ibid 643; cf. Bl. Comm. iii 406.
[7] Vol. iii 648-653. [8] 32 Henry VIII. c. 30.

in the attorney of one of the parties, "or any other default or negligence of any of the parties, their counsellors or attornies." In 1576[1] and 1623-1624[2] a further list of faults of form was enumerated, which were to be cured by verdict; and in 1584-1585[3] a similar list was made which, for the future, were not to be insisted on after demurrer, unless the party specially objected to them when he demurred.

In 1529[4] an attempt was made to shorten the pleadings in the possessory assizes. It did not effect very much; for, as we shall see, the action of ejectment continued to encroach rapidly on the sphere, not only of the assizes, but also of the other real actions.[5]

Proceedings in error.

I have already dealt with the provision made for proceedings in error by Elizabeth's enactments relating to the Exchequer Chamber.[6] We have seen that proceedings in error were begun by writ of error which lay for errors on the record, or on a bill of exceptions.[7] In one case the right to bring this writ was taken away. It was enacted in 1586-1587[8] that no record of attainder, when the person attainted had been executed, should be reversed by that person's heirs. The reasons for passing the Act must be looked for in the political necessities of the time. It was in 1587 that Mary Queen of Scots had been executed.

Costs.

In expensarum causa victus victori condemnandus est. This rule was, when Blackstone wrote, as true of English law as of the civil law.[9] But, though from an early date the Chancellor, in the exercise of his equitable jurisdiction, had assumed the fullest power to order the defeated party to pay costs,[10] it was only by degrees that the principle made its way into the common law.[11] The amercement of the vanquished party was perhaps considered a sufficient punishment.[12] But a payment to the king or lord was not much satisfaction to the successful party; and so, side by side with the amercement, we get the gradual growth of the rule that the vanquished party must pay costs.

[1] 18 Elizabeth c. 14.
[2] 21 James I. c. 13.
[3] 27 Elizabeth c. 5.
[4] 21 Henry VIII. c. 3.
[5] Pt. II. c. 1 § 1.
[6] Vol. i 244-245.
[7] Ibid 222-224.
[8] 29 Elizabeth c. 2.
[9] Code 3. 1. 13. 6; Bl. Comm. iii 399.
[10] Vol. i 403; and cf. the authorities from 1596 onwards, cited in Andrews v. Barnes (1888) 39 C. D. at p. 138.
[11] P. and M. ii 595.
[12] Bl. Comm. iii 399.

The amercement gradually became merely formal, and finally disappeared;[1] but the law about costs has increased in bulk and complexity from the thirteenth century onwards.

There are some grounds for thinking that in all cases where damages were recoverable a successful plaintiff could recover costs under the name of damages.[2] But this rule did not apply where no damages were recoverable; and in actions to recover land it is clear that only the profits of the land, and not damages, could be recovered.[3] Some changes were made in these rules in the latter part of the thirteenth century. The Statute of Marlborough (1267) provided that if a lord maliciously impleaded his tenants, on the pretext that they had made feoffments to defeat his wardships, they should be able to recover damages and costs.[4] The Statute of Gloucester (1275) allowed damages and costs to the successful plaintiff in certain real actions;[5] and laid down the rule that a plaintiff who recovered damages should always be entitled to costs. This rule was applied even when a later statute increased the damages payable for an existing offence.[6] But, if a later statute provided that a fixed amount of damages should be recoverable for a new offence created by it, Coke thought that no costs were recoverable by the plaintiff, unless under the express provisions of the statute.[7]

These rules applied only to the original proceedings and not to proceedings in error, and, except in the single case provided for by the Statute of Marlborough, only to successful plaintiffs, and not to successful defendants. Both of these defects were partially remedied by statutes of this period. A statute of 1487[8] provided that costs should be recoverable from those against whom the court had decided in the proceedings on a writ of error, or from those who had by their default discontinued the

[1] Blackstone tells us, Comm. iii 376, that "the amercement is disused, but the form still continues."

[2] Robert Pilfold's Case (1613) 10 Co. Rep. at p. 116a, "In all cases where a man should recover damages he should recover costs, which is meant of all cases where he should recover damages; either before the said Act of 6 E. I. or by the said Act;" Bl. Comm. iii 399; P. and M. ii 595.

[3] The Statute of Gloucester, 6 Edward I. c. 1 § 2, recites that, "before time damages were not taxed, but to the value of the issues of the land."

[4] 52 Henry III. c. 6—"Quod si aliqui capitales domini feoffatos aliquos malitiose implacitaverint, fingentes casum istum . . . tunc adjudicentur feoffatis dampna sua et misæ suæ quas fecerint occasione placiti predicti, et ipsi actores per misericordiam puniantur."

[5] 6 Edward I. c. 1—the actions were the possessory assizes, writs of entry sur disseisin, cosinage aiel and bisaiel; for these writs see vol. iii chap. i § 1.

[6] Robert Pilfold's Case (1613) 10 Co. Rep. at pp. 116a, 116b.

[7] Ibid; but this rule, after having been questioned in several cases, was overruled in Tyte v. Globe (1797) 7 T.R. 267.

[8] 3 Henry VII. c. 10.

proceedings. Statutes of 1531[1] and 1565[2] allowed successful defendants to recover costs in certain specified actions and courts; and in 1607 defendants were allowed to recover costs in all actions in which the plaintiff was entitled to costs.[3]

As a result of this legislation as to costs we get in 1605-1606[4] the first of the statutes designed to put some limits upon the amounts charged by attorneys and solicitors.

Provision was made in 1495 for the poor man by the introduction of suits *in forma pauperis*. A statute of that year[5] provided that poor persons should be entitled to writs without payment, and that judges should assign attorneys and counsel to act without fee. It was provided in 1531[6] that, when the unsuccessful plaintiff was a pauper, he should not be compelled to pay costs under this statute, but should suffer such other punishment as appeared reasonable to the judges. In the seventeenth century the practice appears to have been to tax the costs, and, if the costs were not paid, the court could adjudge that the plaintiff be whipped.[7] But after the Revolution this practice seems to have been gradually discontinued. Holt C.J. on a motion that a pauper be whipped for non-payment of costs on a non-suit, refused, saying that "he had no officer for this purpose and never knew it done."[8]

Judicial machinery.

Under this head can be grouped a few miscellaneous statutes passed to improve the organization and machinery of the courts. We have already seen that the growing importance of witnesses had necessitated the creation of the crime of perjury, and a machinery to compel witnesses to appear and testify.[9] Two statutes of 1543-1544 and 1557-1558[10] provided for an improved

[1] 23 Henry VIII. c. 15—the actions specified were trespass on the statute of forcible entry, debt or covenant on a specialty or a simple contract, detinue, account, action on the case for a wrong.

[2] 8 Elizabeth c. 2—defendants in the King's Bench, or in the courts of corporate towns or other places having privilege to hold pleas of personal actions were to recover costs if the plaintiff delayed or discontinued his action or was non-suited.

[3] 4 James I. c. 3; it may be noted that 24 Henry VIII. c. 8 provided that plaintiffs who sued on recognizances and other obligations to the king's use should not, if non-suited, be liable to pay costs; Bl. Comm. iii 400 points out, in this connection, that the king neither paid costs if defeated nor got them if successful.

[4] 3 James I. c. 7.

[5] 11 Henry VII. c. 12.

[6] 23 Henry VIII. c. 15.

[7] Munford v. Pait (1665) 1 Sid. 261.

[8] Anon. (1697) 2 Salk. 506; however, in 1702, 7 Mod. 114, it was said that if a pauper be non-suit he shall not go on without paying the costs or showing according to the statute 23 Henry VIII. c. 15 § 2 that he was whipped; but in Blackstone's time the practice was disused, Comm. iii 400; cf. Blood v. Lee (1769) 3 Wils. 24.

[9] Above 515-519.

[10] 35 Henry VIII. c. 6, extended by 4, 5 Philip and Mary c. 7 to cases where the crown was a party, and to *qui tam* actions; 27 Elizabeth c. 7 dealt with certain abuses which had crept in in connection with these statutes.

procedure for summoning the jury, and for punishing jurors who failed to appear. A statute of 1548[1] gave persons, who wished to defend their rights as against an office found for the king, the power to traverse the office, instead of proceeding by the cumbersome method of a petition of right. Other statutes show that the inconveniences resulting from the growing centralization of the judicial machinery were beginning to be felt. In 1514-1515[2] it was provided that the judges of the King's Bench might remove indictments, sent into that court to be tried, into the counties where the crime had been committed. In 1576,[3] in order to relieve the courts of common law of some of their business in term time, it was provided that issues joined in the Chancery or the common law courts should be tried at nisi prius at Westminster in term time, or four days after the end of the term. In 1601 it was provided that writs to remove suits depending before inferior courts must be served before the jury appeared;[4] and that if a personal action were begun in any of the superior courts for a less sum than 40s. the plaintiff should not be able to be awarded as costs a greater sum than he recovered in the action.[5] We have seen that statutes of James I.'s reign recognized and strengthened the court of Requests set up in London by the Common Council for the trial of actions of Debt when the amount at stake did not exceed 40s.[6] Another Act of his reign restricted the removal of cases from inferior courts of record to Westminster, if the judge of the inferior court was a barrister of three years' standing.[7]

A statute of 1603-1604 imposed a penalty on any referee, to whom any cause had been committed by any of the courts at Westminster, if he directly or indirectly took any money or other reward for his report or certificate.[8]

If we look at this collection of statutes as a whole we cannot but see that the largest and by far the most important part of it is concerned with those branches of law, public or private, which were bound up with the economic and social problems of the age. And it is natural that it should be so. All questions relating to commerce and industry affected the state very nearly in this age

[1] 2, 3 Edward VI. c. 8; below Pt. II. c. 6 § 1.
[2] 6 Henry VIII. c. 6.
[3] 18 Elizabeth c. 12.
[4] 43 Elizabeth c. 5.
[5] Ibid c. 6; vol. i. 74.
[6] 1 James I. c. 14; 3 James I. c. 15; vol. i 188.
[7] 21 James I. c. 23; vol. i 74; for a bill on these lines in 1620-1621 which failed to pass see Hist. MSS. Com. 3rd Rep. 18.
[8] 1 James I. c. 10.

of transition from mediæval to modern; and the problem of the Use was, in one of its aspects, a fiscal problem. This legislation was, on the whole, successful. By its means this transition from mediæval to modern was effected in England with perhaps less friction than was experienced in any other country in Europe, and with the most beneficial results upon the development of trade, the organization of industry, and the settlement of the relations between the different classes of society. At the same time the settlement of the problem of the Use helped forward the development of that trust concept which can claim to be the most original contribution which English law has made to general jurisprudence. But, apart from uses and trusts, the legislature was content to leave the development of some branches of the criminal law, and of many branches of purely private law to the lawyers. It intervened occasionally to remove a grievance or to alter an inconvenient rule; but the statutes which made these occasional changes show that the principles of the branches of law which they modified must be looked for elsewhere than in the statute book. Thus the law of contract and tort, some parts of the criminal law, and many parts of the land law, the development of equity, and of mercantile and maritime law, were left almost entirely either to the common law courts, the Chancery, the Star Chamber, or the Admiralty. As in the preceding period, the lawyers not only developed on their own lines these important branches of the law, they also interpreted the statutes relating to all branches of the law. By means of this interpretation they worked their provisions into the logical system which they were developing. At the same time some of them, by their literary labours, which took many different forms, conferred great and lasting services upon all parts of the law, by recording, explaining, systematizing, and sometimes criticizing the results of the work of the law courts and the legislature. With these various activities of the lawyers and their influence upon legal development I shall deal in the three following chapters.

APPENDIX

I

THE JUSTICES OF THE PEACE

(1) THE CONTENTS OF LAMBARD'S EIRENARCHA

The Proheme.
Book I.—Conteining a theorique (or insight) of the office of Justices of Peace.
Chap. I.—What Justices of the Peace be, and why they are called Justices.
Chap. II.—Of the signification of this word *Peace*.
Chap. III.—Of such as had the Conservation of the Peace at the Common Lawe.
Chap. IV.—Of the first ordeining of the Wardens and Justices of the Peace, by Statute Law.
Chap. V.—By whose authority, and by what means Justices of the Peace be appointed: and of what sorts they be.
Chap. VI.—What manner of men the Commissioners of the Peace ought to be.
Chap. VII.—How many Commissioners of the Peace there ought to be in each County.
Chap. VIII.—The forme of the late reformed Commission of the Peace.
Chap. IX.—An explication of sundrie parts of the said Commission of the Peace.
Chap. X.—Of the Oaths usually ministered to the Justices of Peace.
Chap. XI.—Of the power absolute, and limited, that the Justices of the Peace have.
Chap. XII.—Of the Jurisdiction, and Coertion, belonging to the Justices of Peace.
Chap. XIII.—The Justices of the Peace be Judges of Record.
Chap. XIV.—How long time the authority of the Commissioners of the Peace is to endure: and by what means it may be suspended, or determined.
Book II.—Containing the Practique of the Justices of the Peace, and of the Sessions.
Chap. I.—That all the authority of the Justices of the Peace is exercised, either out of the Sessions, or at (or by reason of) the Sessions of the Peace, etc.
Chap. II.—What any one Justice of Peace (out of the Sessions) may doe to prevent the breach of the Peace, and therein of Surety of the Peace, and the good Behaviour, and of sundry things incident to the same.
Chap. III.—What any one Justice of Peace out of the Sessions may doe concerning the staying or punishing of the Breach of the Peace without a multitude, against the person.

Chap. IV.—What any one Justice of Peace out of the Sessions may doe concerning the Breach of the Peace, without, or with a multitude, by Forcible Entrie into Lands or Tenements, etc.

Chap. V.—Of other breaches of the Peace, with a multitude: As by Riot, Rout, or other unlawful Assembly, etc., and what any one Justice of the Peace may doe therein out of the Sessions.

Chap. VI.—What other things any one Justice of the Peace alone may doe out of the Sessions, by vertue of Statutes mentioned in the Commission.

Chap. VII.—What other things one Justice of the Peace may doe, out of the Sessions, by the power of other Statutes, not mentioned in the Commission, and therein of manslaughter, and all other Felonies.

Book III.—Conteyning the Practique of two (or moe) Justices of the Peace out of the Sessions.

Chap. I.—What things any two Justices of the Peace may do, out of Sessions: and therein first of Riots, etc.

Chap. II.—What things some two Justices of the Peace may doe out of the Sessions: and therein of Bailement.

Chap. III.—What things three or moe Justices of the Peace may doe out of the Sessions.

Chap. IV.—Of the reward and punishment of Justices of the Peace, for things done, not done, or misdone out of the Sessions of the Peace.

Book IV.—Intreating of the Sessions of the Peace, and of things incident or belonging thereunto.

The Proheme.

Chap. I.—The Description of the Sessions of the Peace.

Chap. II.—Who shall appoint the Sessions of the Peace: and how, and where.

Chap. III.—What persons ought to appeare at these Sessions, and therein of the Castos Rotulorum, the Records of the Sessions, and the Clarke of the Peace, and how the Jurors ought to be qualified and ordered, and of the privilege of the Sessions.

Chap. IV.—Of the Articles that are to be given in Charge, at the Sessions of the Peace.

Chap. V.—Of the Endictments, and Presentments, given by the Jurors: and of the Matter, and forme, and receiving, and rejecting of them.

Chap. VI.—Of the Presentments and Informations of Officers, and other men.

Chap. VII.—Of the impediments of proceeding upon Endictments, before the Justices of Peace, and therewithall of the Certiorari to remove Records.

Chap. VIII.—Of the sundrie sorts of Processe upon Endictments and Informations: and of the Supersedeas for stay of them.

Chap. IX.—Of Hearing upon Confession.

Chap. X.—Of Hearing by Discretion.

Chap. XI.—Of Hearing (or Triall) upon Examination.

Chap. XII.—Of Hearing (or Triall) by Certificat.

Chap. XIII.—Of Hearing (or Triall) by Traverse.

Chap. XIV.—Of Triall upon Arraignement, and therewithall of the Triall of Felonies, and what Pleas, or other helpes may be used therein.

Chap. XV.—Of Judgement.
Chap. XVI.—Of the Processe for the Fine of the King, and of the assessing thereof: and of the Estreating for the King.
Chap. XVII.—Of Executorie Processe, and Execution, for the parties that sue, or for other persons: and of the restitution of goods stollen.
Chap. XVIII.—Of certifying the Records of the Sessions of the Peace to other Courts or Officers.
Chap. XIX.—Of the generall (or quarter) Sessions of the Peace.
Chap. XX.—Of the Speciall Sessions of the Peace.
Chap. XXI.—Of the Rewards and Punishments due to Justices of the Peace in respect of their Sessions.
The Epilogue.
A Table containing (verie neere) all the imprinted Statutes, both generall and particular, wherewith Justices of the Peace have in any sort to deal.
Now follow sundrie Enditements, Presentments, and Processes.
An Appendix [containing an index to the Precedents set out in the Treatise].
A Table of all the principall matters and words conteined in the Booke of the Office of Justices of Peace, observing the Alphabeticall order.

(2) THE ARTICLES OF THE CHARGE GIVEN BY JUSTICES OF THE PEACE AT QUARTER SESSIONS. Lambard, Eirenarcha (Ed. 1619), 406-483

The points of the charge that wee have in hand, may be reduced to a few heads, and that after sundry sorts of distribution: of which (for examples sake) I will shew you some. First thus,

1. All the matters inquirable, be either Ecclesiasticall, or Lay and Temporall: and these Temporall, be either high treasons, petit treasons, felonies, otherwise punishable and fineable offences: Or thus,

2. All these points, do either concerne God, the Prince, or Subject: Or thus,

3. The breach of these Articles, is offensive either against the first or the second Table of the Ten Commandements of God: Or thus,

4. All these matters be inquirable, either by vertue of the Commission of the Peace, and of the statutes therein implied, or else by power of the statutes not comprehended within the Commission: Or thus,

5. All these Lawes doe either command or prohibit things agreeing or repugnant to some of the foure cardinall (or principall) vertues, Prudence, Justice, Fortitude, or temperance: Or thus,

6. All offences inquirable here, bee either voluntarie, involuntarie, or mixt: Or thus,

7. All these Ordinances doe either draw us to the good, or withdraw us from the evil, of the mind, the bodie, or fortune: Or thus,

8. Men doe offend these laws, either by doing nothing of that which is commanded: or by doing another thing then is commaunded: or by doing that amisse, which is commanded well: Or thus,

9. These Lawes be offended, either by doing too much, or too little.

They may also be divided, by the variety of the punishments, & by some other accidentall respects: all which I leave to the choise of such as shall give them in charge, and will now (for this time) set downe the Articles themselves, after the order of the first & third sort of division, pointing out in the first place the Ecclesiasticall causes, & then pursuing the Temporall.

In which doing, first, I will omit all such statutes as do concerne but only

some one, or a few particular places, knowing that I write to the most part, who have not to do with them.

The maner of this charge.

Secondly, I will purposely pretermit the distinct rehersall of punishments, conteyned in the statutes that I am to run thorow: as well for brevities sake, because those do rather pertaine to the Justices, then to the Jurors, as also for that I have an ancient precedent or two to make for me: the one of the Justices in Eire (who in their charge) did only read the articles in offence, without using any mention of the paiens due unto the same. As it appeareth by *Bracton*, *Britton*, and the small volume of the old Statutes, under the Title *Capitula Itineris:* and another like of the Articles delivered to the enquest of Office in the kings bench, as is to be seene in the booke of Ass. lib. 27 pl. 44.

And yet, if in some speciall point it may bee serviceable, to have the paine of the Law laide wide open (as in a great many through the lenitie thereof, it will doe no good at all) the Reader shall find it for the most part quoted in the margine here, and readie to be used by him.[1]

Lastly, I will neither recite all the parts of each generall Statute by it selfe, nor yet comprehend them wholly and fully with others: because the first of these waies would be verie long, through the often iteration of the same things, and the other would be so crooked and comberous (through the varitie and difficultie of the exceptions) that the hearer would bee many times lost, before I should come to the end.

I know, that Mr. Fitzherbert was of the opinion, that the Justices of peace ought at their quarter Sessions, and might at their privat Sessions, give in charge to the inquest, all such matters as they have power to determin: and this he urgeth, as well by the Oath of the Justices (who are sworn to do right in all causes within their Commission, or the statutes) as also by the ignorance of the Jurors, who be instructed only by the charge: which if it be so, I see not (for my part) how either these Justices (that are bound to utter all, can be discharged, or the Jurors (that ought to heare all) can be informed without this, or some such compendious and plaine way, that may both shortly for the time, and lightsomely for the order, comprehend the chief substance of all that which belongeth to their Enquirie.

Howbeit, as I thinke it the best for the Justices, to rehearse all such points, whereof the Jurie may make presentment before them: so yet, I hold them discharged (in my slender opinion) if they unfold only the Articles of their Commission, and of such other statutes as doe expresly authorise them to make enquirie.

For, as there be sundrie Lawes that do give the Just. of the P. a certaine speciall (or particular) power in them, & doe not yet yield unto them any authority to enquire upon the same (of which sort be the statutes, 27 Hy. VIII. c. 20 & 32 Hy. VIII. c. 7 of tithes: the st. 35 Hy. VIII. c. 17 of wood: the stat. 23 Eliz. c. 9 of Logwood, & sundrie others: So also there be divers others, that do afford to the Just. of P. the power of hearing & determining, & yet doe not expresly give them the name of Enquirie.

And, forasmuch as they may heare and determine of these, by Information (given to themselves, and by them recommended to the Jurie) it seemeth to me, that they be not so necessarily bound to give them in charge, but that they be well enough discharged, if they be open & readie to receive the informations and presentments that shall be offered upon them: And of this kind be the statutes of Highwaies (5 Eliz. c. 13 & 18 Eliz. c. 9) the statute of fighting in Church or Churchyard (5 Ed. VI. c. 4) the statute of Informers

[1] I have omitted these marginal notes. I have also marked other places where omissions have been made.

(18 Eliz. c. 5) and sundrie others, whereof it would be superfluous to make rehearsall.

Nevertheless, because I will not that my fantasie shall either stand against his judgement, or be prejudiciall to other mens profit, I have contended (what I may) to deliver the principall and most serviceable parts not only of the Commission and of such Lawes as doe specially conteine their inquirie within them, but also of all such other statutes as may bee heard & determined by Justices of the Peace at any their Sessions: and that in so narrow a roome, as (if I be not after some proofe, deceived) they may be distinctly read over in a couple of houres, at the most: So alwaies, that the varieties of the punishments, the yeeres of the kings and their Parliaments, and such other Notes as fall in by the way, bee left unread and be passed over.

Ecclesiastical Causes

Extoll any foreign power.

If any person have (within this halfe yeare) by writing, printing, teaching, preaching, expresse deed or act, advisedly, maliciously and directly affirmed, holden, set forth, or defended the authoritie, preheminence, power, or jurisdiction Spirituall or Ecclesiasticall, of any foreine Prince or person whatsoever heretofore claimed, used, or usurped in this Realme, or any the kings Dominions, or have advisedly, maliciously, and directly, put in use or executed any thing for the extolling, setting forth, or defence of any such pretended or usurped jurisdiction, preheminence, or authoritie, or any part thereof. Or if any person (compelable to take the Oathe of Recognition of the kings Majestie to be supreme Governor in all causes within his Dominions) have refused to take the said oath, after lawfull tender thereof to him made, 1 Eliz. c. 1; 5 Eliz. c. 1 enquirable by words of 23 Eliz. c. 1.

Pope.

If any person, under the kings obedience, have at any time (within this yeere) by writing, cyphering, printing, preching, or act advisedly holden, or stood with, to extoll, or defend the power of the Bishop of Rome, or of his See hertofore claymed or usurped within this Realme: or by any speech, open in deed, or act, advisedly attributed any such maner of authoritie to the said See of Rome, or to the Bishop thereof, within any the Kings Dominions, ye shall present him, his abbettors, procurors, counsellors, ayders, and comforters. 5 Eliz. c. 1.

Withdraw any from obedience.

If any person have by any means practised to absolve, perswade, or withdraw any other within the kings Dominions from their natural obedience or (for that intent) from the religion now established here, to the Romish religion, or to move them to promise obedience to the See of Rome, or other estate: Or if any person have been willingly so absolved, or withdrawne, or have promised such obedience.

And if any person have willingly ayded or mainteyned any such offender, or knowing such offence have concealed it, and not within XX daies, disclosed it to some Justice of Peace or other higher officer. 23 Eliz. c. 1.

Depart out of the realme to serve a forein prince.

If any subject of this Realme have after the X day of June in the yeere of our Lord God 1606 gon out of this Realme to serve any forein Prince, State, or Potentate, or have after the said tenth day passed over the Seas, and there hath voluntarily served any such forein Prince, etc., not having taken the Oath expressed. 3 Jac. cap. 4 before the Customer & Controller of that port, haven, or creeke where he had passage.

If any Gentleman, or person of higher degree, or any person which hath borne any office or place of Captain, Lieutenant, or any other place, charge, or office in Campe, Armie, or Companie of Souldiers, or Conductor of Souldiers, have after gone voluntarily out of this Realme to serve any forein Prince, State or Potentate, or have voluntarily served any such Prince &c.,

before he become bound by obligation, with two sufficient sureties unto the king, his heirs or successors, according to this Act. 3 Jac. c. 4.

Masse. If any person have (1) said or sung Masse: or have willingly (2) heard Masse. 23 Eliz. c. 1.

Bull. If any person have used or put in use, any Bull, Writing, or Instrument of Absolution or reconciliation, or of other sort, gotten from the Bishop of Rome, or See of Rome, or from any person clayming authority from the same: Or have by colour of any such taken upon him to absolve or reconcile any person, or have published any such Bull or Instrument: Or if any person have received such absolution, or have procured, abetted, or counselled any such offendor, to the intent to uphold such offence.

If any person have (after such offence) ayded, comforted, or mainteyned such offendor, to the intent to uphold the authoritie of the said See of Rome.

If any person (to whom such Bull or Instrument hath been offered or perswaded) have not within sixe weekes next after signified the same to some of the Kings privie Councell, or the Kings privie Councell, or the Lord President of the North, or of Wales.

If any person have brought hither from the Bishop or See of Rome, or from any person authorised, or claiming to be authorised by any of them, any Agnus dei, crosses, pictures, beads, graines, or such like superstitious things, and have the same delivered, or caused, or offered to be delivered to any the kings subjects to use or weare in any wise: and if any person have to such intent received or taken the same, & have not apprehended the offerer thereof, nor within three daies after disclosed him to the Ordinarie, or to some Justice of the P., nor within one day delivered the thing to some Justice of the Peace. 13 Eliz. c. 2, 23 Eliz. c. 1.

Jesuits and Seminaries. If any person (being at libertie or out of hold) have since the viii day of May, in the 27 yeere of the raigne of the late Queene Elizab.) wittingly and willingly, received, ayded, or mainteyned, within any part of his Highnesse Dominions, any Jesuit, Seminarie Priest, or such other Priest, Deacon, or Religious, or Ecclesiastical person, being borne within this Realme, or any his Highnesse dominions, and (at any time since Midsomer, in the first yeere of the said late Queene Eliz. raigne) made, ordeyned, or professed by any authoritie derived, challenged, or pretended from the See of Rome knowing him to be a Jesuit, Seminarie priest or other such Priest, Deacon, or Religious, or Ecclesiasticall person. 27 Eliz. c. 2.

Conjuration. If any person have used Invocation, or Conjuration of any evill spirit, or have consulted, covenanted with, entertained, imploied, fed, or rewarded any evill spirit for any intent, Or have taken up any dead man, woman, or child or any part of any dead person to be used in any maner of witchcraft, sorcery, charm, or inchantment, Or have used witchcraft, inchantment, charme, or sorcerie, whereby any person hath bin killed, destroied, wasted, consumed, pined, or lamed in his bodie, or any part thereof.

Felony. If any person have undertaken by Witchcraft, Inchantment, Charme, or Sorcerie, to tell in what place any treasure of gold or silver might be found, Or where goods lost or stollen should be become, or to the intent to provoke any person to unlawful love, or to destroy, or impaire any persons goods, or to hurt any person in bodie although the same were not effected. 1 Jac. ca. 12.

Prophecying. If any person have within these sixe Monethes advisedly advanced, published and set forth by writing, printing, open speech, or deed to any other person, any fantasticall or false prophecie, upon arms, fields, beasts, or badges, or upon any time, name, bloodshed, or warre, to make thereby rebellion, dissention, losse of life, or other disturbance within the Kings Dominions. 5 Eliz. c. 1.

Perjurie. If any person have unlawfully procured any other to commit wilfull &

corrupt perjurie, in any cause depending in suit in any of the Kings Courts of Record, or in any Leete, Court Baron, hundred, or court of ancient demesne or have coruptly suborned any witnesses sworne to testifie *in perpetuam rei memoriam:* or if any person have upon such procurement, or by his owne act wilfully committed such Perjurie. 5 Eliz. c. 9 and 14 Eliza. ca. 11, 1 Jac. c. 25.

Disturbe a Preacher.

If any person have of purpose, maliciously or contemptuously molested, or by any unlawfull meanes misused any preacher lawfully authorised in any his open Sermon or preaching, in any Church, or other place used, or to be appointed: and who were his aiders, procurers, or abetters. 1 Ma. c. 3. *Learn if this statute do stand for this part.*

Sacrament.

If any person have (within these 3 months) by contemptuous, or reviling words, or have advisedly in any otherwise depraved, despised or reviled the blessed Sacrament of the bodie and blood of Christ. 1 Ed. VI. cap. 1, & 1 Eliz. cap. 1.

Service and Sacraments.

If any Parson, Vicar, or minister have refused to use the Common prayers, or to Minister the Sacraments according to the Booke of Common prayers: or (wilfully standing in the same) have used any other forme in open prayers, or in administration of the Sacramentes, or have spoken any thing in derogation of the sayde Booke, or any part thereof: Or if any person have in any play, song or rime, or by any open word, spoken in derogation of the said booke, or of anything therein contained: or have caused or maintained any parson, vicar, or minister, to say any common praier, or to minister any Sacrament in other maner, then after the said booke: or have interrupted any Parson, Vicar, or minister to say open prayer, or to administer any Sacrament according to the sayd Booke. 1 Eliz. cap. 1 & 23 Eliz. cap. 1.

Repaire to Church.

If any person (being above the age of xvi yeres, & not having lawfull & reasonable excuse to be absent) have not repaired and resorted unto his or her parish church or chappell accustomed, or (upon let thereof) to some usual place where common prayer is to be used, upon every Sunday, and other Holy day: and have not there orderly and soberly abiden, during the time of such common prayer, Preaching, or other service of God: and how long such person hath forborne so to repaire and resort. 1 Eliz. cap. 2 & 23 Eliz. cap. 1. See 3 Jac. cap. 4.

Keeping a recusant in his house.

If any person have willingly maintained, retained, relieved, kept, or harboured any Servant, Sojourner, or stranger not repayring to some Church, Chappel or usuall place of Common prayer, to heare Divine service, by the space of one Moneth together, not having a reasonable excuse (other then such as harboreth his father or mother not having other sufficient maintenance, or the ward of any such person, or any person committed to the custodie of any by authoritie) or have retained or kept in service, fee, or liverie any not repairing to some Church, as before, by the space of a moneth together, knowing the same. 3 Jac. cap. 4.

Conformed Recusant.

If any Popish Recusant convicted having conformed him or her selfe, have not within the first yere after hee or shee hath conformed him or her selfe, & after the said first yeere, once in every yeare following at the least, received the blessed Sacrament of the Lords Supper in the parish Church, where he or shee have most usually abiden within the said yeere, & if there were no such parish church, in the church next adioyning. And if he or she having received the said Sacrament as aforesaid, have after eftsoones offended in not receiving the same as is aforesaid by the space of a yeare. 3 Jac. cap. 4.

Popish recusants and seditious sectarie.

If any Popish recusant, or other Seditious Sectarie, which is by any the statuts (35 Eliz. c. 1 & 2), to be abiured this Realme and all his Majesties

Dominions have either refused to make such Abjuration, or making it, have not gone to such haven within such time, as was to him therefore appointed, and have not from thence departed this Realme: or after such departure have returned into any his Majesties Dominions, without his speciall licence. 35 Eliz. c. 1 & 2, 1 Jac. c. 25.

Schoolmaster. If any person have kept or maintained any Schoolemaster which resorteth not to the Church, or is not allowed by the Bishop or ordinary of the Diocesse. 23 Eliz. c. 1.

Fighting in Church or Churchyard. If any person have maliciously stricken any other with any weapon, in Church, or Churchyard, or drawen any weapon there to that intent. 5 Ed. VI. c. 4.

Faire or Market in Churchyard. If any person have kept faire or market in the Churchyard. Stat. Winton 13 Ed. I.

Rob Church or Chappell. If any person have feloniously taken goods out of any Church or Chappell.

Felonies in Lay Causes

Servant and Master, husband and wife, clarke and prelate. If any servant have killed his or her Maister, or Mistresse: or any wife her husband: or any Ecclesiastical person his prelate. 25 Ed. III. c. 2.

If any person have (of prepensed malice) killed or murdered another, openly or privily, whether he that was killed were an Englishman or a stranger, living under the protection of the king.

Poisoning Murder. If any have wilfully killed any other by poisoning: and who be his aiders, abettors, procurers, and counsellors. 1 Ed. VI. c. 12.

Stabbing Murder. If any person hath stabbed or thrust, another, that hath not then any weapon drawn, or that hath not then first stricken the party so stabbing or thrusting, so as the partie so stabbed or thrust have died thereof within sixe monthes after. 1 Jac. c. 8.

Manslaughter. If any person have by chance-medly feloniously killed another.

Cut out tongue or put out eies. If any person have of malice prepensed, cut out the tongue, or put out the eyes of any of the kings subjects. 5 Hy. IV. c. 5.

Gaoler handling straitly his prisoner. If any Gaoler, keeper, or underkeeper of a prison, have by duresse and paine compelled any his prisoner, to become an appeacher of others against his will. 14 Ed. III. c. 17.

Buggerie. If any person have committed the detestable vice of Buggery with man or beast. 25 Hy. VIII. c. 6 & 5 Eliz. c. 17.

Rape. If any man have ravished a maid, widow, or wife, above tenne yeeres of age, against her will, though she consented afterward. W. II. c. 34.

Child. If any man have carnally knowne and abused a woman child, under tenne yeeres of age, though she consent before. 18 Eliz. c. 7.

Take woman. If any person have taken a maiden, widow or wife, having lands, or goods, or being heire apparent to any, against her will unlawfully, (other than his ward or bondwoman): and of his procurers, abettors, & receivers, knowing thereof. 3 Hy. VII. c. 2.

Marrie, the former husband or wife living. If any person being maried, shall marie any other, the former husband or wife being alive (other then such person, whose husband or wife hath remained beyonde the Sea seven yeares together, or hath absented him or herselfe one from the other seven yeares together within the kings Dominions, the one not knowing the other to be living, or that was at time of such marriage lawfully divorced, or whose former mariage hath by sentence Ecclesiasticall beene declared to be void, or whose former mariage was had within age of consent.) 1 Jac. c. 11.

Robberie. If any person hath robbed another, going or riding by the way, or otherwise, how much or how little soever it be that hee taketh from him: or have privily

Cut purse. and fraudulently picked or cut the purse of another, being upon him. 18 Eliz.

cap. 4. Or hath robbed any house by day, or by night, any person being in the same, or thereby put in feare: Or have robbed any person in any part of his dwelling, the owner, wife, children, or servants beeing therein, or within any other place within the precinct thereof, and then being waking, or sleeping: Or have robbed any person being in a Tent or Booth, in a faire or market, the owner, his wife, children, or any servant being then within the same, sleeping or waking. 5 Ed. VI. cap. 9. Or hath robbed by day time (though no person were then therein) any dwelling house or outhouse there to used, and hath taken thence goods to the worth of above. 39 Eliz. c. 15. Robbe house. Booth or tent.

If any person or persons, have feloniously taken the goods of any other: and whether the same bee above twelve pence in value, or under. Larceny and petit larceny.

If any Purveyor for the kings Majesties house, or his Undertaker, Deputie, or servant, have made any Purveiance without warrant, and have carried any thing away against the consent of the owner, being above twelve pence in value. 28 Ed. I. c. 2, 18 Ed. II. cap. *ultim.*, 5 Ed. III. cap. 4, 2 & 3 Phil. and Mary cap. 6. Purveyors.

If any Purveior of the K. or his undertaker, deputie, or servant, have taken any carriage in any other manner then is contained in his commission. 36 Ed. III. cap. 2. Or have made purveiance without the testimonie and appraisement of the Constable, and foure honest men of the towne, & without delivering tales or Indentures under his seale, testifying his purveiances, the goods being above 12 pence in value. 5 Ed. III. cap. 2, 25 Ed. III. cap. 1. Or hath taken any sheep with their wools between Easter and Midsomer, at small prises, and caried them to his owne house, and shorne them. 25 Ed. III. c. 15.

Quaere, if the felonie of Purveiors (made 36 Ed. III. c. 6) be not altered by 23 Hy. VI. c. 14.

If any person have found a Falcon, Tercelet, Lanor, Laneret, or other Falcon that was lost, and hath not forthwith brought it to the Sherife, that hee might proclame it, but did steale and carrie away the same. 34 Ed. III. c. 22, 37 Ed. III. c. 19. Hawkes.

If any servant (being 18 yeres of age, and not being an Aprentice) hath gone away with or hath converted to his own use, any money, jewels, goods or cattels of his masters, or mistresses, and of his or her deliverie to keepe, of the value of xl. s. to the intent to steale the same. 21 Hy. VIII. c. 7, 5 Eliz. c. 10. Servant embeseling goods delivered.

It any person have by night broken any house, tower, walles, or gates, and hath entred in with an intent to doe any robberie murder, or other felonious act there: or if any person have burned any dwelling house: or have by night burned any barne neere to a dwelling house. Burglarie. Burne house or barne.

If any person imprisoned for felonie, have broken the prison. 1 Ed. II. Or if any other person have broken the prison for such a prisoner, by which he escapeth: or if any Gaoler have willingly suffered such a prisoner to escape: & if any person, being arrested for felonie, have beene rescued, and by whom. Breake prison.

If any person, having the charge or custody of any Armor, Ordinance, Munition, Shot, Powder, or habiliments of Warre of the K. Majesties, or of any victuals (provided for the victualling of any Souldiers, Gunners, Mariners, or Pioners) shall for any lucre, or gain wittingly, advisedly, and of purpose to hinder or impeach his Majesties service, embesile, or convey away any of the same to the value of xx shillings at once, or at severall times, 31 Eliz. cap. 4. Convey munition or victuals.

If any person have unlawfully hunted in the night, in any Forest, Parke, or Warren, or with painted faces, vizors, or other disguisings, to the intent to be unknowne, and have upon examination by one of the K. Counsel, or by a Justice of peace of the same shire, wilfully concealed such hunters or hunting, Hunting by night.

or have disobeied any arrest for such hunting, or made rescue to any person warranted to arrest such hunter so that the warrant was not executed. 1 Hy. VII. c. 7.

Multiplying. If any person have practised the arte of multiplication of gold or silver. 5 Hy. IV. cap. 4.

Convey sheep. If any have the second time brought, sent, or received, into any ship or bottome, any rams, sheep, or lambs, being alive, to be conveied out of the K. Dominions, or procured the same. 8 Eliz. c. 3.

Infected with the plague. If any person infected with Plague, and commanded to keepe house, have wilfully and contemptuously gone abroad and conversed in company, having any infectious sore upon him uncured. 1 Jac. cap. 31.

Rebellious assemblies. If any persons (of or above the number of twelve) have beene assembled, and have entended, gon about, and practised with force of armes, unlawfully to change any lawes of this realm or to cut or cast downe any inclosuer of parke, or inclosed ground, or the bankes of any fishpond, or any conduit head or pipe, to the intent they should lie open, or void, or to have any Common or way there: Or to destroy the Deere or Conies in any Parke or Warren, or Dovehouses, or fish in Poole, or in Pond, or to cut downe any houses, barnes, milles, or hayes, or to burne any stack of corne or graine, or other usuall sustenance of men: and (being commanded by the Sherife or any Justice of the peace of the shire, or by the Maior, Sherife, Justice of the peace, or Bailifes of the city, borough or corporat towne, where the assembly was, by proclamation in the kings name to depart to their houses) have notwithstanding continued together one houre after, or have after that, forcibly attempted to do any such thing.

And if any person have unlawfully by ringing of Bell, sounding of Trumpet, Drumme, Horne, or other Instrument, or by firing of Beacon, or by malicious speech, or Outcry, or by setting up, or casting any writing, or by any other act raised, or caused to bee raised twelve persons, or have, in such maner and to any such intent as is aforesaid, & they (being commanded by proclamation, as before) have nevertheles continued together one houre after or have afterward attempted forcibly to do any of the said things: And if any the wife, or servant of any the said assembled persons, or if any other person have willingly & without compulsion delivered or conveied money, harnesse, weapon or victual to any of the said persons assembled during their aboad together as before, And if any person have hindred or hurt any that did proclaim or went to proclaime, as before: & if any parties so assembled (knowing of that hindrance, or procuring it) have neverthelesse afterward committed or put in use any the things aforesaid: And if any persons (to the number of fortie or moe) have so assembled to the intent to doe any the said things, or any other felonious or rebellious act, and have continued together three houres, after such proclamation made, at or nigh the place of assembly, or in some market towne next adjoyning, and after notice to them thereof given. 1 Mar. Parl. 1 c. 12 & 1 Eliz. c. 16.

Souldiour Mariner, or Gunner departing If any Souldiour (entred a Souldiour of Record) and having taken part of the kings wages, or any Mariner or gunner (having takn prest wages to serve the king on the Sea) have not accordingly gone to his captain (unlesse he were letted by notorious sickness, or other impediment from God) or have departed from his Captaine, without his licence under his seale. 18 Hy. VI. cap. 19, 2 and 3 Ed. VI. cap. 2, 4 and 5 Phil. and Mar. cap. 3, and 5 Eliz. cap. 5. But consider whether this entring of Record have any use now.

Egyptians. If any strangers, calling themselves, or being commonly called Egiptians, have remained in the Realme one moneth: And if any person (being foureteene yeeres of age) which hath beene seene, or found in the fellowship of such Egyptians, or which hath dignified himselfe like to them, have remained

heere, or in Wales by the space of one moneth, either at one time, or at severall times. 1 and 2 Phil. and Mar. cap. 4, 5 Eliz. cap. 20.

Dangerous Rogue.

If any dangerous Rogue, that was banished the Realme, or adjudged perpetually to the Galleyes, have returned into the Realme without lawfull licence. 39 Eliz. c. 4, 1 Jac. c. 25.

If such Rogue after he hath beene branded in the open Sessions with a Romane R. upon the left shoulder, and sent to the place of his dwelling, the place where he last dwelt by the space of a yeare, or the place of his birth, to be placed in labour, have offended againe in begging or wandring contrarie to the statute. 39 Eliz. c. 4 or this Act, 1 Jac. c. 7.

Idle Souldier and Mariner.

If any Souldier, or Mariner, or other person (as Souldier or Mariner) have wandred idle, without setting himselfe to service, labour, or other lawfull course of life, and hath not repaired to his place of birth, or dwelling: and had not a lawfull Testimonial from a Justice of peace, of or neere the place where he landed: or hath counterfeited such Testimoniall, or hath caried the same (knowing it counterfeit). 39 Eliz. c. 17. 1 Jac. c. 25. . . .

Accessaries before.

If any person have commanded, counselled, waged, or procured to be committed any petit treason, murder, manslaughter, Rape, Robberie, burglary, or other the felonies aforesaid.

Accessaries After.

If any persons knowing the said Felons, have received, comforted, aided, abbetted, or favoured them, before their attainder, or after.

Hitherto of Felonies and their accessaries in Lay causes, all which are punished by the pains of death, except petit Larceny.

Maime

If any person have maimed another of any member, whereby he is the lesse able to fight as by putting out his eye, striking of his hand, finger, or foot, beating out his forteeth, or breaking his Scul: And of their Accessaries.

Trespasses.

If any have committed unlawfull assault, beating, wounding, or such like trespasse, against the bodie of any man: Or have with force & against the Law taken the goods of another, or have done any trespass in the lands of another, *Commission of the peace.*

Extortion.

If any Ordinarie, Archdeacon, Officiall, Sherife, Escheator, Coroner, Undersherife, Bailife, Gaoler, or other officer, have by color of his office, or for doing his office, taken a greater or more excessive reward or fee then belongeth to him: or have taken any fee or reward for expedition in doing his office or have unlawfully exacted any oath or other undue thing, *Commission of the peace.*

Escheator.

If any Eschetor (other then of such a Citie, borough, or towne, as hath anthoritie to make Escheators within themselves by Letters Patents of the king, or his progenitors) have taken upon him that Office in this shire, or occupied in this shire, or another, and had not then in this shire, lands, tenements, or rents, for life at the least of 20l. by yeare: or have sold or set to ferme that office, or made any deputies for whom he will not answere, and whose names he hath not certified within 20 daies after into the Eschequer. 12 Ed. IV. 9.

Of if any Escheator hath taken for the execution of any *Diem clausit extremum*, or other Writ in one Countie, above xls. in all: or that xls. where the lands are not found to be holden *in capite*. 23 Hy. VI. cap. 17 and Fitzh. 143. Or hath taken for the finding of any office of lands (not exceeding five pounds by yeere) above xvs. in all, for all things thereof. 33 Hy. VIII. c. 22.

Sherifes and their Ministers etc.

If any Sherife have letten his Countie, or any his Bailiwikes, Hundrethes, or Wapentakes; or have returned in any pannels, any bailifes, officers, or their servants, or servants servants, or have refused to let to Baile (upon sufficient sureties) any person being in his custody, because of any action personal, or because of endictment in trespass, & not being in for any Condemnation, Execution, Utlawrie, Excommunication, Suretie of the Peace,

or commanded of any Justice, or for being a vagabond: Or have taken any obligation by colour of his office, but only to himselfe, and upon the name of his office, and upon condition only to appeare according to the writ or warrant: or have taken for an arrest above xxd. Or if he, or any other minister, have taken any thing for making of any Returne or Pannel: or above 4d. for the copy of the Pannel or above 4d. for the said obligation, or for any warrant or precept: or any Bailife above 4d. for making any arrest: or the Gaoler above foure pence upon the committing to his Ward of any person arrested, or attached. 23 Hy. VI. c. 10.

Sherifes arresting or levying fine for Enditements in his turne.

If any Sherife, or other his minister, have arrested, or imprisoned, or caused any fine, or ransome, or amerciament to be levied of any person, by reason of any Enditement of presentment made in the Sherifes turne, or lawday, without proces from the Justices of peace for the same first obtained: or have not brought in such enditements and presentments to the Justices of peace, at their next Session. 1 Ed. IV. c. 2.

Sherifes entring of plaints and levying amerciaments.

If any Sherife, or any his ministers, have entred into his booke, any plaints in any mans name not being present at the Court, either in his own person, or by sufficient and honest atturney or deputie: Or have entred any moe plaints then the plaintife supposeth that he hath cause of action for: Or have levied the shire amerciaments without booke indented between them and two

Bailife serving warrant.

Just. of the peace: or if the bailife of the Hundred have made default in warning or executing any warrant against any defendant in the Sherifes Court. 11 Hy. VII. cap. 15.

Sherifes must shew the estreats under the Exchequer Seale.

If any Sherife or his Minister have levied any the debts of the king, without shewing to the parties the estreates of the same, under the seale of the Exchequer. 42 Ed. III. cap. 9, and 7 Hy. IV. c. 3.

Sherifes to returne additions of Jurors.

If any sherife of this shire (or any other person to whom it appertained to make returne of any writ) hath returned any Juror without the true addition of the place of his abode at the time of that returne, or within a yere next before, or without some other addition by which the Juror might well be knowne: If any Estreat of issues hath beene gathered of any person, other then such as by vertue of the said Estreat was of right chargeable or charged therwith. 17 Eliz. c. 7.

Under sherifes, clarkes and bailifes to be sworne.

If he that taketh upon him to be the undersherife of this shire, hath not (before his exercising of that office) taken the oath of the supremacie, and the oath of his Office, before the Justices of Assise or one of them, or before the *Custos Rotulorum*, or two Justices of the peace, the one being of the Quorum.

If any Bailife of franchise, deputie (or Clarke) of the Shire, or under sherife, or other person taking upon him to returne any Enquest, Jurie, or Tales, or to meddle with the execution of processe in any Court of Record, have not before that received and taken the said oath of Supremacie, and the oath (appointed for such Officer to take) before some of the said Justices, after this maner.

If any undersherife, or other of the sayd persons, hath committed any Acte contrary to the said othes. 27 Eliz. cap. 12.

Sherife and Gaoler.

If any Sherife or Gaoler have denied to receive felons, by the deliverie of any Constables or towneships, or have taken any thing for receiving of such. 4 Ed. III. cap. 10.

Sherife Bailife etc.

If any Sherife, Bailife, or other officer or person, have refused to pay over to the Churchwardens and Overseers of the poore, the moitie, of the forfeitures by the Statute 4 Jac., against utterance of Beere or Ale to Alehousekeepers unlicenced. 4 Jac. c. 4.

Fees in Liberties.

In Liberties, the Bailifes, Stewards, and other ministers there, have like fees, and punishments for Extortion, as Sherifes and their ministers have out of Liberties. 27 Hy. VIII. cap. 7.

If any Coroner have refused to doe his office upon the view of a dead body by misadventure, without taking any fee therefore. 1 Hy. VIII. c. 7. Or have taken upon the view of the dead bodie of a man slaine or murdered, above xiiis. iiijd. of the goods of the slayer or murderer, if he had goods, or (otherwise) of the Towne where he was slaine in the day time, and was suffered to escape. 3 Hy. VII. cap. 1. Coroner.

If any Ordinarie, or his Scribe, or Register, have taken moe, or greater fees, for the probate of a Testament, or for Letters of Administration, then hee ought to take, that is to say, 6d. for the Scribe, for writing the probate of a Testament, that shall be brought written in parchment, and likewise sixe pence for the Administration, where the goods of the Testator or Intestate, bee not above v. li. If the goods be above five pounds, and not above fortie pounds, then two shillings sixe pence for the Ordinarie, and twelve pence for the Scribe. If they exceed fortie pounds, then two shillings sixe pence for the Ordinary, and ijs. 6d. to the Scribe, or else one penny for every tenne lines at ten inches length, at the Scribes election: the like shall bee given for every copie of a Testament or Inventory, or else after the rate of lines as before. 21 Hy. VIII. cap. 5. Ordinarie.

If any parson, Vicar, or Curate, have taken above foure pence for entring into the Church Booke the licence of a sick person to eate flesh upon the fish dayes. 5 Eliz. cap. 5. Or above two pence for Registring of a Testimoniall of any servant, departing from one place to another. 5 Eliz. c. 4. Parson. Vicar. Curate.

If any spiritual person (or any other for him) have taken Mortuarie (or corps present) or anything for the same in any place, where the same was not used to be given before the one and twentie yere of K. Henry the eight: or taken (in places where Mortuaries were then used) any thing for a Mortuary where the goods of the dead person were under ten markes: or more than three shillings foure pence therefore where the goods were of the value of tenne markes, and under thirtie pounds: or above sixe shillings and eight pence therefore, where the goods were under xl. pounds: or above ten shillings where the goods were above xl. l. 21 Hy. VI. c. 5. Mortuary.

If the Clerke of the Peace have taken above twelve pence for the enrolling of the bargaine and sale of any land, not exceeding forty shillings by the yeare; or above two shillings 6 pence if the land exceed that value by the yeare, 27 Hy. VIII. c. 16. Or have taken above two shillings in all, for any licence and Recognisance of a badger, drover, kidder, or lader, and for the Registring thereof, 5 Eliz. c. 12. Or have taken above xijd. for a Recognisance of him that taketh a Rogue into his service for one yeere. 14 Eliz. cap. 5. Clerke of the peace.

Or if the Clerke of the Peace or the towne-clerke have not accepted, entred, and recorded without fee, the presentments at the quarter Sessions of the monethly absence from Church of popish Recusants, and of the names of their children of nine yeres old and upward, biding with their parents, and of the names of the servants of such Recusants, appointed to be made by the Churchwardens and Constables or some of them, or by the chiefe Constables of the Hundred, according to the statute. 3 Jac. cap. 4.

If the Clarke of any Justice of Peace have taken above xijd. for any Recognisance of an Alehouse keeper, or Tipler. 5 Ed. VI. c. 25. Justices Clarke.

If the Clarke of the Market have taken any common fine, to dispence with faults: or hath ridden with moe then five horses, or hath tarried longer in the countrie than the necessitie of his businesse required. 13 Rich. II. c. 4. Clarke of the market.

If any officer have in any Towne taken Scavage, or Shewage (that is to say) any thing for the shewing of ware, or marchandize that be truly customed to the King before. 19 Hy. VII. c. 8. Scavage.

If the Mayor of this Towne of Maidstone (and so of other townes in other shires) have taken above one penny for sealing a bushel measure: or above Scale weights.

one penny for sealing an hundred weight, or above a halfe penny for halfe a hundred weight, or above a farthing for any lesse weight. 7 Hy. VII. c. 3, and 11 Hy. VII. c. 4. . . .

Churchwarden Constable High Constable.

If the Churchwardens & Constables of every town, parish, or chappel, or some one of them, or where there be none such, the Constable of the hundred, hath not once every yere presented at the quarter Sess. the monthly absence from church of Popish recusants, and the names of every of their children (of 9 yeres old & above, abiding with their parents) & as neere as they could the age of the said children, and the names of the servants of such Recusants. 3 Jac. c. 4.

Churchwardens. Overseers of the poore.

If any Churchwardens and overseers of the poore, (to whom the money forfeited by 4 Jac. for uttering of Beere or Ale to Tiplers unlicenced, hath been paid by the Officer or other person, that hath levied or received the same) have not within convenient time truely bestowed the same amongst the poore. 4 Jac. c. 4.

Purveiors. Constable. Borsholder.

If any Purveiors of the kings Ma. have taken any thing of the value of xls. or under without readie payment therefore made: if any Constable or Borsholder have not (upon request made) assisted the owners to resist the Purveiors so taking. And any of the kings officers have procured any to be arrested or vexed for such resistance. 20 Hy. VI. c. 8, and 23 Hy. VI. c. 2.

If any Purveior of timber have felled for the kings use any Oaken timber tree, meet to be barked, but onely in barking time (other then trees for building or repaire of the Kings houses or ships:) Or have taken any profit by the lops, tops, or barke of any trees taken by him: Or have taken from the owner any more of any tree then onely the timber of the same tree. 1 Jac. c. 22.

If any Purveior have taken anything of any man, to the end to spare him: or have taken corne by any other measure then by the striked bushel, or by any more then eight such bushels to the quarter: or have taken carriage therefore, without making readie paiment. 25 Ed. III. c. 1, 36 Ed. III. c. 3, and 1 Hy. V. c. 10. . . .

Informer.

If any common Informer or Promoter (as he is commonly called) have compounded or agreed with any person, for any offence against any penall Lawe, without the order or consent of some of the Courts at Westminister, or have willfully delayed or discontinued his suite once commenced. 18 Eliz. cap. 5, and 27 Eliz. cap. 10.

Huy and Cry.

If any man have raised Huy and Cry without cause, or (being raised) upon good cause, have not beene ready at the commandement of the sherife, or at the Huy and Cry of the Countrie, to pursue and arrest felons, or such as have dangerously hurt any man: And if the Sherife or any Bailifs have not followed such Huy and Cry with horse and Armor. W. I., 3 Ed. I. c. 9, 3 Ed. I. *Officium Coronatoris*, Stat. Winch. 13 Ed. I.

Watch.

If the watch in every Borough and towne have beene kept from Sun rising to Sun setting, betweene Accension day, and Michaelmas day, to arrest strangers that passe by in the night season. Stat. Winton. 13 Ed. I.

Highwaies.

If any lord of the soile have not enlarged the highway from market to market so that no dike, bush, nor tree (except great trees) bee within two

Ride or goe armed.

If any persons (except the kings servants and officers in doing their services, and their companie, aiding them in that behalfe) have ridden or gone armed, by day or by night: or have brought force in affraie of the people before the kings Justices, or otherwise. Stat. Northamp. 2 Ed. III. c. 3.

Escape by negligence.

If any person arrested, or imprisoned for felonie, have bin negligently suffered to escape. 1 Rich. III. c. 3.

If any be a Barrettor, or a common quarrellor, or otherwise of evil name

and fame. 34 Ed. III. c. 1. Or a maintainer of quarrels, or an Embracer of Juries. 33 Hy. VIII. c. 10, and 37 Hy. VIII. c. 7, and 38 Ed. III. c. 13. . . . If any be a *Champartour*, that is to say, one that mooveth pleas or suites, or causeth or procureth them to be mooved at his owne costs, to the end to have part of the land, or other thing in variance. 33 Ed. I. Barrettors. Maintainers. Embracers. Champertors.

If any Juror in any Inquest here, have taken any thing of any man to make his presentment favourable. Jurour.

If any person have by himselfe, or other for him, given any Liverie of signe or company, or badge, or retained any man, other then his houshold servant, officer or learned man in the Lawe. 1 Hy. IV. c. 7, 2 Hy. IV. c. 22, and 8 Ed. IV. c. 2. Liveries of Companies and Badges.

If any companie of men (other then men of fraternities, and men of Artes in Cities and Boroughs) have made any one generall sute of cloth, hoods or hats amongst them, to bee known by. 7 Hy. IV. cap. 14.

If any person have by writing, or open speech notified, that the eating of fish, or forbearing of flesh, upon any daies, now usually observed as fish daies, is of necessitie for salvation of Soules, or is the service of God, otherwise then as other politike Lawes bee. 5 Eliz. cap. 5. Fish.

If any person have falsly and deceitfully gotten into his possession any money, or any other things of any other mans, by colour or false privie token, or of counterfeit letter, made in another mans name. 35 Hy. VIII. c. 1. False tokens or letters.

If any person (above the age of seven yeres) calling himselfe a scholler, hath gone about begging: Or if any Seafaring man (not having suffered shipwracke, nor having a lawfull testimoniall from a Justice of Peace, of, or neere the place where he landed) have gone about begging or have transgressed such Testimoniall: Or if any Idle person have gone about begging, or have used any subtill craft, or unlawfull game or play, or have feined knowledge in Phisiognomy, Palmestry, or other like craftie Science, or have pretended to tel Destinies, Fortunes, or such like phantasticall imaginations: Or have uttered himselfe to be a Proctour, Procurer, Patent gatherer, or Collector, for any Gaole, Prison, or Hospitall: Or if any fencer, Beareward, Minstrel, or common Player of Enterluds, Angler, Tinker, Pedler, pety Chapman, or Classeman, have wandered abroad; Or if any wandring person, or common Labourer, (not having otherwise then by labour to maintain himselfe) being able of body, have used loytering, or refusd to work for lawful wages: Or if any person delivered out of Gaole, have begged for fees, or travailed begging, or pretending losse by fire, or otherwise, have wandred begging: Or if any (not being a felon) have pretended to be an Egyptian, or have wandred in the forme, or habit of counterfeit Egyptians: or if any impotent or diseased person (licenced by two Justices of the peace, to goe to Bathe, or Buxton) have not forborne to begge, or have not returned according to such licence: Or if any poore person (appointed to aske reliefe in the same Parish, by the Churchwardens and Overseers therof) shall beg in any other sort then is so appointed. For all such be declared, to be Rogues, Vagabonds, and sturdy beggers. 39 Eliz. cap. 3 and 4. Who be Rogues.

If any Constable, Borsholder, or Tythingman, have not done his best indevour to apprehend such Rogues as have begged, or made aboad within their Limits, or have wilfully suffered any of them to escape punishment. Officers not punishing or conveying Rogues.

If any such Officers have not conveyed such Rogues, towards their places of birth or last dwelling: (See 1 Jac. cap. 7). Or if any person have hindered, by Rescous, or otherwise, the execution of these statuts of Rogues, or of the Poore. 39 Eliz. c. 3 and 4. Poore and Rogues.

If any the Churchwardens and Overseers of any parish have not taken order for setting to worke, or for reliefe of their poore: or have not assessed the inhabitants and occupiers of lands in their Parish thereof: or have not

endevored to levie such assesses: or have absented themselves from their monthly meeting, or have not accounted as they ought. 39 Eliz. cap. 3.

If any Parents or children, being of sufficient abilitie, have not relieved their poore and impotent children or parents, at their owne charge, in such sort as hath at any Quarter sessions of the peace beene appointed for them to doe: Or if the Minister of any Parish have not kept a Register booke of the testimonials for Rogues. 39 Eliz. cap. 3 and 4.

Riots, routs, unlawfull assemblies.

If any persons (to the number of three or above) have beene riotously assembled, to beate any man, to enter upon a possession, or to do any such unlawfull act, & have done it indeed, or attempted to doe it: Or have beene assembled together in Routs for any common quarrell, or otherwise unlawfully against the K. Maiesties peace. 2 Hy. V. cap. 5. *Commission*, under the name of Conventicles.

Rebellious assemblies.

If any persons (above the number of two, and under twelve) being assembled, have intended unlawfully with force to murder or slay any of the king's subjects: or to cut or cast downe any inclosure, or bankes or any fishpond, or conduit head or pipe, or to do any the deeds (mentioned in unlawfull assemblies before) and have not departed upon proclamation, but have attempted to do any of these things.

Or if any person (being moved to make any rebellious assembly) have not within twenty foure houres after disclosed the same to a Justice of the Peace, or to the Sherife: Or if any person have stirred or procured any other to make such assembly. 1 Mar. Par. 1 cap. 12, 1 Eliz. cap. 17.

Lying in await.

If any have lien in awaite, to maime, or kill any other.

Forcible entries.

If any have entred into lands or possessions with force, or entring peaceably, have holden the same with force. 8 Hy. VI. c. 9.

Cut Ponde head, fish, hunt Deere, take Hawkes, or their Egges.

If any person have unlawfully broken, or destroied, the head or damme of any Ponde, Mote, Stewe, or severall pitte wherein fishes are put by the owner thereof: Or have wrongfully fished in any of the same, to the intent to take away the fish against the owner's will: Or have wrongfully entred into any parke or other ground, before the statute inclosed, or after this statute, (by the licence of the king) to bee inclosed, and used for keeping of deere, and have wrongfully hunted, driven out, hurt or killed any Deere there: Or if any person have unlawfully taken away any Hawke, or the egges of any Hawke out of the woods or grounds of any other person. 5 Eliz. c. 21. See 2 Jac. cap. 13.

Takes Hawks egges: take hawkes or drive them away.

If any person have taken, or caused to bee taken upon his owne, or other mens ground, the egges of any falcon, Gothawke, Laner, or Swanne, or have taken any Eirer, Falcon, or Gothawke, Tercel, Lanner, or Lanneret, or have purposely driven them out of their coverts: or have borne any hawke of the

Niessehawke.

breed of England called a Niesse, Gothawke, Tassel, Lanner, or Lanneret. 11 Hy. VII. c. 17.

Dogs, Nets, Ferrets.

If any Artificer, Laborer, or other Lay man, not having lands or tenements of xls. by yere, or any spiritual person advanced to x. l. living by the yeare, have kept grayhound, hound, or other dogge to hunt: or have used ferrets, nets, or other engins, to take or destroy deere, hares, conies, or other gentlemans game. 13 Rich. II. cap. 13.

Trace Hare.

If any person have traced, killed & destroied any Hare, in the snow. 14 Hy. VIII. c. 10.

Take Pheasants or Partridges.

If any person whatsoever, have taken, or killed any Phesant or Partridges, with any manner of net or other devise whatsoever, upon the freehold of any other without special licence, or in the night time, except it were unwillingly, by lowbelling or tramelling, who also did then and there presently let them

Hawking in Corne.

goe againe: Or, if any person have hawked, or with his spaniels hunted in any ground (not being his own) where any corne or grain, did then grow or

before it was shocked, or copped, without the consent of the owner of such corne or graine. 11 Hy. VII. c. 17, 23 Eliz. c. 10. See 7 Jac. c. 11.

If any person have shot at, killed, or destroied with gun, crosbow, stronbow, or longbow, any fesant, partridge, housedove, or pigeon, herne, mallard, ducke, teale wigeon, grouse, heathcocke, moregame, or any such fowle, or any hare: Or have taken, killed, or destroied any fesant, Partridge, Housedove, or Pigeon, with setting dogs & nets, or other engine: Or have taken the egs of any fesant, Partridge, or Swans, or willingly destroied the same in the nests: Or have traced, or coursed any Hare in the Snow, or taken any Hare with harepipes, cords, or any such instruments or engines. 1 Jac. 27. See 7 Jac. c. 11. . . .

Grayhound setting dog, &c.

If any person keepeth any Grayhound, for coursing of Deere or Hare, or setting dogge, or net to take fesants, or Partridges, (not being seised of some estate of Inheritance, of lands, tenements, or hereditaments, in his owne right or in the right of his wife, of the yerely value of x pounds: Or of lands, tenements, or hereditaments, in his own, or wives right, for terme of life, of the yerely value of xxx.li. Nor being possessed of goods to the value of 200 l. to his owne use. Nor being the Sonne of a knight, Baron of the Parliament, or of some higher degree, or Sonne and heire apparent of an Esquire).

Deere &c.

If any person have sold, or hath bought to sel again, any Deere, Hare, partridge or fesant (not brought up in house). 1 Jac. cap. 27.

Unlawful hunting.

If any person, in the night time, or by day, have unlawfully broke, or entred into any Parke, impaled, or other severall grounds inclosed, used for the keeping of Deere: Or in the night time have unlawfully broke or used for the keeping of Conies, and unlawfully have hunted, driven, or chased out, or taken, killed, or slaine there any Deere, or Conies, against the will of the owners, occupiers, or possessors of the same, not having lawfull authoritie so to doe. 3 Jac. cap. 13 and 7 Jac. cap. 13.

Usurie.

If any person have by himselfe, or any other, sold any Marchandizes or wares, to any other, & have within three monethes next after that, by himselfe, or by any other bought the same, or any part thereof againe, upon a lesser price, knowing them to be the same: Or if any person have by any corrupt bargaine, mortgage, or other meanes, taken in gaine above the rate of ten pounds for the hundred, for one whole yeares forbearance, & so after that rate, for more or less. 37 Hy. VIII. cap. 9, 13 Eliz. cap. 8, and 27 Eliz. cap. 11.

Forestallers, Regrators. Ingrossers.

If any have within these two yeares forestalled, regrated, or ingrossed unlawfully. . . .

Seed corne.

If any person have within these two yeeres bought corn in any faire or market for change of his seed (having then sufficient for his house and for sowing his ground for a yeare) and did not bring thither (if he might) so much as hee did so buy, and did not the same day sell it after the price then going. 5 Ed. VI. cap. 14.

Making of Malt.

If any person have (at any time within this yere, the moneths of June, July, & August only excepted) made any Barley Malt, that was not the time of 3 weekes (at the least) in the fat, floore, steeping, & sufficient drying: & if in any of the said 3 months, & was not 17 daies (at the least) in the fat, floore, steeping, and sufficient drying.

If any person have within this yeare mingled any Malt not sufficiently made (or made of mowe burnt, or spired Barley) with other good Malt, and after put the same to sale.

If any person hath within this yeare put to sale any Malt not sufficiently wel troden, rubbed, and fanned, whereby halfe a pecke of dust, or more may bee fanned out of one quarter thereof. But this Act extendeth not to Malt made for the provision of a mans owne house or familie. 2, 3 Ed. VI. c. 16 and revived 27 Eliz. cap. 14, 1 Jac. c. 25.

If any person (beeing lawfully restrained touching his making of Malt) have not accordingly forborne to make the same. 39 Eliz. cap. 16.

Live cattell. If any person have within these two yeres bought Oxen, Ronts, steeres, kine, heifers, calves, sheepe, lambs, goates, or kids, lyving, and sold of the same againe alive, before he hath kept them five weekes. 5 Ed. VI. c. 14.

Barke. If any person have regrated, ingrossed, or got into his hands any Oaken barke, to the intent to sell the same again. 1 Jac. cap. 22.

Hides. If any person have forestalled any hides, or bought any hide out of open Market or Fayre, unlesse of such as have killed beasts for their owne provision. 1 Jac. cap. 22.

Woollen yarn. If any person have bought any Wollen yarne, and have not made Cloth thereof. 8 Hy. VI. cap. 5. Or have bought any Wooll, but of the owner of the sheepe, and of the tith. 14 Rich. II. cap. 4.

Weinlings under two yeares. Calves under 5 weekes old. If any Butcher or other person, have killed any weinling, bullocke, steere, or heifer (under the age of two yeres) to be sold whole, or by retail: Or have killed any Calfe for to sell, being under five weekes old, 24 Hy. VIII. c. 9, 1 Jac. c. 25, and 1 Jac. c. 22.

Egges of the Wilde foule. If any person have willingly (betweene the first of March and last of June in any yeere) taken away, or destroied the Egges of any Wilde fowle (used to bee eaten) from the place where they did lay them. 25 Hy. VIII. c. 11, 3 Ed. VI. c. 3.

Milch kine and Calves. If any person (feeding above a hundred and twenty sheare Sheepe for the most part of the yeare, upon his grounds that be meet for milch kine, and wherein no person hath any common) have not for each 60 such sheepe reared one Calfe, during the time of keeping such Sheepe. 2, 3 P.M. c. 3, 13 Eliz. c. 25. Or if any person feeding upon his severall pastures above 20 Oxen, Ronts, steers, scrubs, heifers, or kine, have not for everie tenne such beasts, kept one milch Cow, and for every two kine weaned and reared up yerely one Calfe, except it chance to die, *ibid.* Hee that feedeth such Sheepe or beasts onely to be spent in his house, is excepted, *ibidem.*

Salmons. If any person have taken any Salmons, betweene the feast of the Nativitie of the blessed virgin Mary, and of S. Martin in any rivers or waters: Or have taken young Salmons at any mil poole, or other place between the midst of Aprill and Midsomer: or have at any time cast into any waters any net, by which the fry of any fish may be taken. W. II. c. 48, 13 R. II. c. 19, 17 R. II. c. 9.

Frie of fish. Salmons. Trouts. Assise of fish. Nets. Angling. If any person have with any net, or meane, taken and killed any frie or spawne of any fish in a weare floudgate, streame, or river (salt or fresh) or at the taile of any Mil: or have taken there any Salmons or Trouts, out of season, that is, being kippers, or shedders: Or have taken and killed any Pickerel under ten inches in length, or Salmon under sixteen inches, or Trout under eight inches, or barbell under twelve inches: or have fished in any the said places with any net, but such wherof every mesh was two inches & a halfe broad: But angling is excepted, and so is the taking of Smelts, Loches, Minewes, Binheads, Gudgeons, and Eeles, in places onely where they have beene used to be taken. 1 Eliz. cap. 17, 14 Eliz. c. 11, and 27 Eliz. c. 11, 1 Jac. 25. See 3 Jac. cap. 12.

Victualers prices reasonable. If any Butcher, Fishmonger, Inholder, Tipler, Brewer, Baker, powlter, or other sellor of Victual, have not sold the same at reasonable prices, & for for moderte gaines. 23 Ed. III. c. 6, 13 Rich. II. cap. 8.

Brewers. If any Beere brewer, or Ale brewer have sold their drinke at higher prices then have been appointed by justices of peace. 23 Hy. VIII. c. 4.

Victualers conspiring. If any Butchers, Bakers, Brewers, Poulterers, Cooks, Fruterers, or any mysterie of any of them have conspired or taken any oath, or promise, not to sel but at prices certain agreed betweene them. 2 Ed. VI. cap. 15.

If any Butcher have sold or offered to sell Swines flesh mezled, or any flesh that died of the murreine: Or if any other victualler have sold, or offered to sell, any corrupt or unwholesome victuall. *Stat. Pistorum*, c. 7, 51 Hy. 3. Corrupt. Victuall.

If any person have against proclamation thereof made, transported or carried out of this Realme, any Corne, Graine, or Malt, growing, or made here: Or any beere, butter, cheese, or wood, in any vessel (except to Barwicke, or the Marches thereof) without sufficient authoritie, or any Seafish, or Herring not taken by a naturall borne subject heere: or have by any meanes conveied, or willingly consented to convey any of the said things to any vessel being on the Sea, or in any place or Haven of this Realme, to be transported over Sea, or into Scotland, without sufficient authoritie: Or if any person having licence to convey any of the said things, have fraughted, or laden his vessel, or any part therof, at any moe places than one only. 1, 2 Philip and Mary c. 5, 13 Eliz. c. 11 and 13. See 1 Jac. c. 25. . . . Transport corne, beere, butter, cheese, seafish, herring, wood.

If any person have bought (to sell againe) any Butter, or Cheese, unlesse it bee in open faire or Market, by retailing it after the wey of Cheese, and barrel of Butter, or after a lesse quantitie; Or unlesse it be victualers for that which shall be retailed or spent in their houses. 3 Ed. VI. c. 21 and 14 Eliz. cap. 11, 27 Eliz. cap. 11, 1 Jac. c. 25. Butter and cheese.

If any person have packed fish in barrels, & have mixed the countable fish with the smal fish. 22 Ed. IV. cap. 2, 11 Hy. VII. cap. 23. Or have bought of a Stranger borne, or out of a strangers bottom, any Herring (other then such as comes hither by reason of shipwracke) not sufficiently salted, packed, and casked. 5 Eliz. c. 5. Fish packed. Bought of Strangers.

If any have brought, sent, or received into any Ship or bottome, any Rams, Sheepe, or Lambes, being alive, to be conveyed out of the kings dominions: Or, if any person have procured the same. 8 Eliz. cap. 3. Rammes, Sneep, lambs transported.

If any person have dryed in this Realme to bee sold, any fish taken or brought hither by any Stranger borne. 13 Eliz. cap. 11. Drying of fish brought by Strangers.

If any stranger borne, have brought into this realm, any cods, or lings, packed in barrels, or other casks. 13 Eliz. c. 11. Cods or Lings in caske.

If any person (within this yeare) have taken upon him to set price, to take Toll, or to demand any tare upon any Sea-fish taken by any Subject of the K. in their owner vessels: If any Purveyor or other person have within that time, by colour of any Commission taken any such Herring or Sea-fish (other then the accustomed composition fish for *Island*) against the will of the bringer in thereof: Or if any person have within that time, caused to be laden and carried in any vessel (whereof any stranger borne, is wholly or partly owner or Master) any fish, victuall, or other thing, from one Port or creek of this Realme, to any other of the same: Or if any person have within that time brought into this Realme, or any part thereof, other then into the Ile of Man, or into Wales, any Wine comming out of the dominions of France, or any Tholouse Woad, but only in such Vessell whereof some Subject of the kings was then owner, or part owner. 5 Eliz. c. 5 and 27 Eliz. c. 11. Set price or tare upon sea-fish. Purveyor. Sea-fish and Herring. Wine or woad in a strange bottom.

If any person authorised to sell wine by retaile, have within this yeare sold the same above the prices thereof limitted by the K. proclamation, if there have beene any. 5 Eliz. c. 5 and 27 Eliz. c. 11. Wines retailed.

If any Inholder, Taverner, Alehouse-keeper, common victualler, common Cooke, or common table keeper, hath uttered, or put to sale, any kind of flesh victuall, upon any day in the time of Lent, or upon any friday, saturday, or other day appointed by former law to be fish day (not being Christmas day) except it be to such person as (resorting to such house) had lawfull licence to eate the same according to the statute thereof made. 5 Eliz. c. 5, 27 Eliz. c. 11. See 1 Jac. c. 29. Utter flesh.

If any person (other then by reason of age, sicknesse, childing, or licence) Eating flesh.

have within this yeare eaten flesh in Lent, or upon any fish day observed by the custome of this realme. 2 Ed. VI. cap. 19, and 5 Eliz. cap. 5, 35 Eliz. cap. 7. See the Stat. 1 Jac. c. 29. . . .

Assise of breade and ale. If any common Brewer, Baker, or Tipler, have broken the Assise of bread, beere, or ale: And if any Steward of Leet, or office in market towne, have taken any fine for breach of the assise of bread or ale, in such cases, where corporall punishment is appointed. 13 Rich. II. cap. 8.

Tipler. If any Inn-keeper, Victualler, or Alehouse-keeper, have at any time sold lesse than one full Alequart of the best Beere or Ale for a penie, and of the small ij. quarts for one penie. 1 Jac. cap. 9, 4 Jac. cap. 5, 7 Jac. cap. 10.

Tipler. If any Inne-keeper &c., have suffered any person dwelling in the towne, village, or hamlet, where such Inne, Alehouse, or Tipling house is, to remaine and continue drinking there (other than persons invited by travailers, accompanying them only during their necessarie abode there, laboring and handicrafts men, for one houre at dinner time, and labourers and workmen, which for following their worke lodge or victuall in such houses) other then for urgent occasion allowed by ij. Justices of peace. 1 Jac. cap. 9, 4 Jac. cap. 5, 7 Jac. cap. 10.

Drunkennes. If any person have (within these sixe moneths) remained tipling in any Inne, Victualling house or Alehouse being in the same towne, village, or hamlet, wherein such person dwelt at the time of such tipling (unless in such cases as are by 1 Jac. c. 9 excepted, where see here next before). Or if any person have (within these sixe moneths) beene drunk. 4 Jac. c. 5, 7 Jac. c. 10.

Brewer. If any person have sold uttered, or delivered any beere, or ale to any person, or into the house of any person, that hath sold beere or ale as a common Tipler having licence in force to sel beere and ale. 4 Jac. cap. 4.

Weights and Measures. If any person have bought or solde by any unlawful weights or measures: or if any person have bought or sold in any city or market with any weight or measure that is not awfully marked or signed: 11 Hy. VII. cap. 4. Or have bought corne by heaped measure, in any place (except within shipboard) or have used double measure, the one to buy, the other to sell with. 15 Rich. II. c. 4, 11 Hy. VII. c. 4, 5 Ed. III., *de Pistoribus*.

Common weights and measures. If they of the towne where the kings standerd is appointed to remaine, have not their common Weights and Measures signed, or have not thereby signed weights and measures sold to all that have required the same: And if the head Officers of Market townes have not twice yearely made view and examination of Weights and Measures there. 11 Hy. VII. cap. 4.

Vessel for ale or beere. If any vessel for beere or ale, have bin sold or put to sale, being made of unseasonable wood, or not having thereupon the marke of him that made it: or if any barrell for beere containe not of the kings standard 36 gallons, the kilderkin 18 gallons, the firkin 9 gallons, every barrell of Ale 32 gallons, the kilderkin 16 gallons & every firkin 8 gallons. 23 Hy. VIII. c. 4.

Vessels for Wine, Honey, Oile, Herring Eeles, Salmon. If any have made, or brought into this Realme any Tun of wine not containing 252 gallons, or Pipe not containing 226 gallons, or Tertian not containing 82 gallons, or hogshed not containing 63 gallons, or Butte of Malmsie not containing, 126 gallons, or barrell of Herring not containing, 32 gallons of wine measure: Or barrell of Eeles not containing 42 gallons, or Butt of Salmon not containing 84 gallons: Or any kilderkins, tertians, firkins, or rudelets, but after the same rate. 2 Hy. VI. c. 11, 1 Rich. III. c. 13, and 28 Hy. VIII. c. 14.

Vessels of Sope. If any have made any vessel of Sope, the being empty containeth not 32 gallons for the barrel, 16 for the halfe barrel, and 8 for the firkin, or weigheth above 26 pound, the barel, 13 the halfe barrel, or 6.1 and a halfe the firkin. 23 Hy. VIII. c. 4.

If any millers have taken Toll by heaped measure. 31 Ed. I., *de Pistor et Braciat.* Toll dish.

If any Artificers, workemen, or laborers, have conspired or promised together, or made any oathes that they will not do their works, but at a certaine price or rate, or but at certaine times, or but a certaine work in a day, or that one of them shal not take upon him to finish that which another hath begun. 2 Ed. VI. c. 15. Artificers conspiring.

If any person doe use any Art or manuel occupation (used in the first yeare of the late Q. Eliz.) which hath not beene brought up therein seven yeares (at the least) as an apprentice: or hath set any to worke in it, which is not a workeman, or journeyman by yeare, or hath served as an apprentice. 5 Eliz. c. 4. Artificers.

If any Arrowhead Smith have not wel boiled, brased, and hardened at the appoint with steel, and marked with his mark, such heads of Arrowes and quarels, as he hath made. 7 Hy. IV. cap. 7 Arrowhead Smithes.

If any Butcher have gashed, slaughtered, or cut the hide of any Oxe, Bul, Steere, or Cow, whereby it is impaired: Or have watered any hide except in June, July and August, or have put to sale any putrified or rotten hide. Gash and water hides.

If any person during the time that hee hath used the occupation of a Butcher, have also used the misterie of a Tanner. Butcher.

If any person (during the time that he hath used the misterie of a Tanner) have used also the misterie of a Shoomaker, Currier, Butcher, or of any Artificer using the cutting or working of Leather. Tanners.

If any person (other then such as had a Tanhouse 19 *Die Martii*, 1603, and did then occupie tanning of Leather, or hath beene taught as an Apprentice or hired servant seven yeres in the misterie of tanning of leather, or hath beene wife to a Tanner, or sonne of a Tanner brought up in that mysterie foure yeres, or the Sonne or Daughter of a Tanner, or such person as hath married the Wife, or daughter of a Tanner, that left to the same his Tan-house and Fats) have tanned any Leather, or taken any profit by tanning thereof.

If any person have bought, contracted for, or bespoken any rough hide, or calves skinne in the haire (except salt hides for the necessary use of ships) but such persons onely, as shall and may by this Act tan the same, or will taw the same.

If any person have bought, sold, or bespoken any tanned Leather, not wrought into made wares (other then necks and shreds of Sadlers and Girdlers) but such persons only as will convert the same into made wares.

If any Tanner have suffered any hide to lie in the Limes, till the same be over limed: Or have put any Hides into any Tanne fats before the lime be perfectly wrought out of them: Or have used any thing in Tanning, but only Ashbarke, Oakebarke, Tapwort, Mault, Meale, Lime, Culverdung, or Hendung: or have suffered his Leather to be frozen, or to be parched with the fire or Sunne: Or have tanned any rotten Hides: Or have not suffered the Hides for outer sole Leather, to lie in the woozes twelve moneths, and for the upper Lether nine Moneths: Or have negligently wrought the Hides in the woozes, or have not renewed their wozes as oft as was requisite: Or have put to sale any tanned Hide not wrought according to this statute.

If any Tanner have raised with any mixtures any Hide to bee converted to Barkes, Bend Leather, Clowting Leather, or any other sole Leather, except the same be fit and sufficient for that use.

If any person have put to sale, exchanged, or otherwise departed with any Tanned Leather (red and unwrought) but in open Faire or Market, in the places therefore prepared, unlesse it have beene first lawfully searched and

Sealed in some open faire or market: Or have put to sale any Leather, before it hath beene searched or sealed according to this statute.

If any Tanner have put to sale any Leather insufficiently, or not thoroughly tanned, or not well and thoroughly dried, and the same so found by the Triers of Leather, appointed by this act.

If any person hath set his Fats in Tanhills, or other places, where the wozes or leather to be tanned in the same way take any unkind heats, or hath put any Leather into any hoat or warme wozes, or hath tanned with hoat or warme wozes.

Barke. If any person have felled any Oaken trees meet to be barked, where Barke is worth two shillings a load, above the charges of barking and pilling (Timber for necessarie building and reparations of houses, ships, or milles excepted) but between the first day of April, and the last of June.

Currier. If any Currier have curried any Leather, but in his owne house, scituate in a Corporat or Market Towne: Or have curried any Leather not well tanned, or not thorowly dried after his wet season, or have used in such wet season any deceitfull meanes to corrupt the same: Or have curried any utter sole leather, with any other stuffe then hard Tallow, or lesse of that then the Leather will receive: or inner sole leather, or over leather, but with good stuffe, being fresh and not salt, or have not liquored them thorowly: Or have scalded or shaven too thin, or gasht in shaving, or otherwise, or not wrought sufficiently, any leather.

If any Currier have (during the time that hee hath used Currying) used the seate of a Tanner, Cordwayner, Shoomaker, Butcher, or other Artificer using cutting of Leather.

If any Currier have refused to curry within eight daies in Summer, and sixteene daies in Winter, in all degrees perfectly, any leather brought by any Cutter of Leather, or his servant, bringing with him good stuffe, for the perfect liquoring of the same.

Shoomaker. If any Shoomaker have made any Bootes, Shooes, Buskins, Startups, slippers, or pantofles, or any part of them, of English leather wet curried (other then Deer, Calve, or Goatskins dressed like Spanish leather) but of Leather well tanned and curried, or well tanned only, and well sewed with threed wel twisted, waxed, and rosened, with stiches hard drawne with hand leathers, without mixing Neats and Calves leather in the overleathers thereof: Or have put into any Shooes, Boots, &c. any leather made of Sheepe-skinne, Bull-hide, or Horse-hide, or into the upperleather of any Shooes, Startups, Slippers, or Pantofles, or into the nether part of Boots (the inner part of the shooe onely excepted) any part of the wombe, Neck, Shanke, Flanke, Pole, or Cheek of any Hide, or into the utter sole other then the best of the Oxe or Steere hide, or into the inner sole other then the Wombes, Neck, Poll, or Cheeke, or in the Treswels of the double-soled shooes other then the flanks of any the said hides: Or have put to sale in any yeere (betweene the last of September and the twentieth of April) any Shooes, Bootes, Buskins, Startups, Slippers, or Pantofles, meet for any person above foure yeeres old, wherein hath bin any dry English leather (other then Calve or Goate skins dressed like Spanish leather:) Or have shewed for sale any of his wares upon the Sunday.

If any Lord of Faire or Market have not appointed and sworne yerely two, three or more honest and skilfull men to be serchers and sealers of leather there, and sixe honest and expert men to try the same Leather: and if such Triers have don their dueties therein without any delay: And if any Sercher or Sealer so appointed, have refused with speed to seale good leather, or have allowed insufficient leather: or have received any bribe, or exacted any undue fee for execution of his office: or if any person duely elected Sercher or Sealer refuse to execute the same Office.

If any person have denied, withstood, or not suffered any such Searcher to enter into any house or other place to serch tanned Leather, and wrought ware, or to seize and carrie away that which was insufficient: Or have put away any Tanned Leather (red and unwrought) without registering the same, and the price thereof: Or have bought any Tanned Leather before it was searched and sealed, or have carried it out of any Faire or Market, before it was registered.

If any person (to whom any unlawfull leather or stuffe hath beene given by this Act) have given, or sold the same, to any person that hath sold the same againe. 1 Jac. c. 22.

Goldsmiths, and gilding.

If any Goldsmith, or worker of silver, have wrought any silver, that is not so fine in allay as the sterling, or have not set his marke upon his worke before he set it to sale, 2 Hy. VI. cap. 14. And if any have gilded any Sheaths, or any mettal but silver, saving the spurs of Knights, and the apparrell of a Baron, or such as are above that estate. 8 Hy. V. cap. 3.

Pewterer, or Brasier.

If any Pewterer, or Brasier, have sold, or exhanged any Brasse, or Pewter, but onely in open faire, or Market, or in his house, unlesse hee were thereto required by the buyer: Or hath wrought any hollow wares of lay mettall, which is not according to the assise of the lay mettall wrought in London: Or have not set his seale or marke upon the said ware. 19 Hy. VII. cap. 6 and 4 Hy. VIII. cap. 7.

Tilemakers.

If any Tilemaker have not digged and cast up his earth for Tile, till after the first of November, or have not stirred and turned it till after the first of February following: Or if he have wrought it before the first of March following: or if hee have not wrought and tried it from stones, veines, and chalke: Or if hee have made, or any person have put to sale, any plaine Tile, under x inches and a halfe in length, sixe inches and a quarter in breadth, and halfe an inch and a quarter in thicknesse: Or any roofe Tile under xiii inches in length, and halfe an inch and halfe a quarter in thicknesse, with convenient deepnesse: Or any gutter Tile under x inches and a halfe in length, with convenient thicknesse, bread, and deapth. And if any Searchers appointed for the oversight of the true making of Tile, have not done their effectual indevor and diligence in their behalfe. 17 Ed. IV. cap. 4.

Ware works.

If any person have sold, or set foorth candles or other workes of Ware to sale, at higher price then after the rate of four pence for the pound, over the common price of plaine ware between Merchant and Merchant. 11 Hy. VI. cap. 12.

Clothmaking and Dying.

If any Clothmaker have not set his Seale of Lead unto his Cloth, thereby declaring the just length thereof, to be tryed by the water. 3 Ed. VI. c. 2.

If any person have stretched any Cloath above one yard and a halfe in length, or one quarter of a yard in breadth, or have put to sale any Cloath that hath shrunke more in the wetting then is aforesaid: Or have stretched any narrow Streit or Kersey above one yard in length, and a quarter of a yard in breadth, or have put any such to sale that have shrunke more in the wetting. 3 Ed. VI. cap. 2.

If any Dyer of Woollen Cloath, have dyed any brown Blewes, Pewkes, Tawnies or Violets, that were not perfectly boyled, grained, or maddered upon the Woad, and shot with good Corke, or Orchall sufficiently. 3 Ed. VI. cap. 2.

If any person have dyed any wooll for Cloth called Russets, Marbles, Gráies, Bayes, or such like, or for Hats or Caps, unlesse it were perfectly woaded, boyled, and maddered: Or have dyed with Brazell, to the intent to make a false colour, in any such Cloth or wool: Or have put any floxe, chalke, starch, or other deceivable thing upon any Cloth (except certaine Devonshire and Cornwall straights. 3 Ed. VI. c. 2.) Or have occupied any Proncards, or

picards in rowing of any woollen Cloth: Or have sold any Cloth of any lesse measure then after the true content thereof by the yard and ynch: Or have put to sale in this Realme any Cloth (being pressed) to bee occupied in England, Wales, or Ireland. 3 Ed. VI. c. 2.

If any Overseers of Cloth, appointed by the Justices of peace for this yere, have refused to be overseers, or have not within their charge, made due search thereof once everie Quarter: And if any person have interrupted them to make such serch. 3 Ed. VI. cap. 2.

If any Kentish broad Cloth (except course Cloth onely not exceeding vi. l. price) hath bin made, that contained not in length between xxviii. and xxx. yardes, being wet: and in breadth seaven quarters within the listes: and in weight 76 pounds, being well scoured, thicked, milled, and fully dried. 5 Ed. VI. cap. 6, and 4 and 5 P. and M. cap. 5. See this altered 4 Jac. c. 2.

Linnen cloth. If any person have used, or caused to be used, any racking, beating, or casting of any deceitful liquor, or other meane, with any kind of Linnen Cloth, whereby the same became deceitful, or the worse for the good use thereof. 1 Eliz. cap. 12.

Scites of religious houses. If any owner of any Scite or Precinct, and Demeasnes of any late dissolved Religious house (that was in yearley value under 200 pounds) doe not keepe an honest and continuall houshold thereupon. 27 Hy. VIII. c. 22, and 5 Eliz. c. 2.

Sheepe. If any person have at once kept above the number of 2000 Sheepe of all sorts, against the purport of the Statute. 25 Hy. VIII. c. 13.

Faire and Market for Horses. If any Owner, officer, or ruler of any Faire or Market, have not appointed one certaine open place there, for the sale of Horses, Geldings, Mares, and Coltes, and one sufficient person to take Toll, and keepe the said place: And if any such Toll-gatherer, or his deputy, have taken any more then one penie toll for one contract, or for entring the names of the parties, and that in the same place onely, and betweene tenne of the clocke in the morning, and Sunne-setting. 2 and 3 Phil. and Mar. cap. 4.

Entrie in toll booke. If any person have in any Faire or Market, sold, given, or put away, any Horse, Mare, Gelding, Colt, or Filly: unlesse the Toltaker, Bookekeeper, Bayliffe, or chiefe Officer thereof, will take upon him perfect knowledge of the same person, his name, surname, and place of dwelling, or resiance, and shall enter the same into a booke kept for horses sold: or unlesse the said person doe bring to such Toltaker, bookekeeper, &c. one sufficient and credible person that can and will testifie, that he knoweth the seller, giver, or putter away, his name, surname, mysterie, and dwelling place: and there enter into such booke, as well the same, as the name, surname, mysterie, and place of dwelling, or resiance of such testifier, together with the true price that shall be taken for any such Horse, Mare, Gelding, Colt, or Filly so sold: None shall so testifie unlesse hee doe indeede truly know the same, upon paine to forfeite five pound for everie default in any the premises. And the like paine upon the Toltaker, or other Officer aforesaid, that shall refuse to give to the buyer, or taker of such Horse, &c., a true note in writing of that his entrie, the party paying two pence for the same. 31 Eliz. cap. 12.

Inne-holder. If any Inn-holder (dwelling in any Citie, Towne corporate, or Market towne, wherein is any common Baker that hath been Apprentice there seven yeeres)

Horsebread. have within his owne house made any horse bread: or (dwelling in any other thorowfare) have made it insufficiently, and not of due assise. 13 Rich. II. c. 8, and 32 Hy. VIII. c. 41.

Hay and oats. If any Innholder have taken any thing for litter: or have taken excessively for hay, or have taken above one half peny in a Bushel of oats, over the common price in the Market. 13 Rich. II. cap. 8, and 4 Hy. IV. cap. 25.

If any person have been retained into service to worke for any lesse time

then a whole yeere, in any the Arts of a clothier, wollen weaver, tucker, fuller, clothworker, sheereman, dier, hosier, tailer, shoomaker, tanner, pewterer, baker, brewer, glover, cutler, smith, ferror, currier, sadler, spurrier, turner, capper, hatmaker, feltmaker, bowyer, fletcher, arrowhead-maker, butcher, cooke, or miller. And if any person being unmaried (or under thirtie yeeres of age, and married) and being compellable to serve in any of those Artts, have refused to serve. Servants not retainable for lesse then one yeere. Refusing to serve.

If any person being between the age of twelve yeeres and threescore, and being compellable to serve in Husbandry, have refused to serve in Husbandry, after request thereof made by any person keeping Husbandry: And if any person have given any wages, contrary to the Rates of wages of Servants and Labourers appointed and proclaimed. Greater wages.

If any person retained in Husbandrie, or any the said Arts, have after his retainer expired, departed out of one limit, town or parish, into an other, without a Testimoniall: And if any person have accepted into his service any so departing, without shewing such Testimoniall. Testimoniall.

If any person have put away his Servant before the end of his term, without reasonable & allowed cause before a Justice of the peace, or at the end of his terme, without a quarters warning before given: And if any servant have departed without such cause before the end of the terme, or at the end thereof, without such warning given before two lawfull witnesses. If any Artificer or Labourer, hired by the day, or weeke, have not continued at his worke so many houres in the day as he ought: Or taking any worke by the great, have unlawfully departed before the finishing thereof. Put away, or depart away. Undertake worke and not finish it.

If any Servant, workman, or Labourer have wilfully & maliciously made any assault or affray upon his Master, or Dame, or other person having the charge of such workers, or worke. Assault Master or Dame.

If any Constable, or head officer, have not upon complaint, put into the stocks two daies & one night, every Artificer, or person meete to labour, that hath refused to labor in Hay time, or Harvest, for the getting or carrying of corne, hay, or grain, being therto appointed by a Justice of peace, or such Constable, or head officer. Labor in Hay-time and harvest.

If any person have taken any Apprentice against the order of the Law: And if any person have exercised any Art, not being brought up therein as an Apprentice seaven yeeres. 5 Eliz. cap. 4 and 5. Apprentices.

If the Churchwardens of any Parish have not every Sunday levied the money for reliefe of the Prisoners in the Gaole, & once in every quarter paid it to the Constable of the Hundred: Or if the Constable have not at every Quarter Sessions paied over the same to the Collector thereto appointed: Or if such Collector have not weekely distributed the same for reliefe of the said Prisoners. 14 Eliz. cap. 5, 1 Jac. cap. 25. Prisoners relieved.

If any person hath (since the end of the last Session of Parliament) made, builded, or erected, or caused to be made, &c. any maner of Cottage for dwelling: or converted, or ordained any buylding, or housing, to be used as a Cottage for dwelling, unlesse the same person have laid thereunto 4 Acres (at the least) of ground (to be accounted by the Ordinance *de Terris mensurandis*) being his or her owne Freehold and inheritance, lying neere to the said Cottage to be continually manured therewithall so long as that cottage shall be inhabited. Inmates.

If any person have willingly maintained or upholden such cottage, not having so many acres so lying and manured.

If there be any Inmates, or mo households then one, dwelling in any one Cottage, by the placing, or suffering of any owner or occupier of such Cottage.

But this statute extendeth not to any Cottage in any citie, corporate (or market) towne, or ancient Borough. Nor to the dwelling of any workers in Cottages.

Mineral workes, coale mines, Quarries of stone, or slate, or about the making of brick, tile, lime, or coale so that they be not distant above one mile from the workes, & be used only for the habitation of such workers: Nor to cottages within a mile of the sea, or upon the side of any Navigable river within the Admirals jurisdiction, so as none dwell therein but Sailers, or men of Manuel occupation for the making, furnishing, or victualling of ships, or vessels used to serve on the Sea: Nor to any Cottage in any forrest, chase, warren, or parke inhabited only by they that keepe the Deere, or game there: Nor to any cottage hereafter to be made, wherein only a common heardman, or common sheepheard of any towne, or any poore, lame, sick, aged, or impotent person that dwel: Nor which for any just respect (upon complaint to the Justices of Assise at the Assises, or to the Justices of peace at the Q. Sessions) shall by their order (entred in open Assises, or Q. Sessions) be decreed to continue for dwelling, for so long time onely as by such decree shalbe limited, 31 Eliz. Reg. c. 7. Nor extendeth to any Inmates to be placed by the order of the Justices in their quarter Session, with the leave of the Lord of any wast, or common, at the charge of the Parish, Hundred, or Countie. 43 Eliz. cap. 2.

Bridges. If any bridges in the Highwaies (being out of the Cinque Ports, and members thereof) be broken or decaied, to the annoiance of passengers, and if yea, then what Hundred, Citie, towne, parish, or person certaine, or bodie politike, ought of right to repaire or amend the same. 22 Hy. VIII. c. 5.

Highwaies. If the Constables and Churchwardens of any parish, have not in Easter weeke called their parishioners together, & appointed overseers of the works for amendment of the highwaies leading to any Market, or have not appointed the sixe daies for that worke: & if any such Overseers, have refused that charge. And if any person (having a plow land in tillage or pasture, or keeping a draft or plow) have not found one Waine or Cart, furnished to worke eight houres, everie of the said daies: Or if any other person (being assessed in Subsidie to v. l. in goods, or xl. s. in lands) have not likewise found two able men: or if any other housholder or Cotager, have not by himselfe or any other, so wrought every of the same daies.

If the hedges, ditches, trees, and bushes, in and on each side of any such highway bee not kept low, scowred, and cut downe by the owners of the grounds adjoining: If any such overseer, have not within one month after any of the said offences done, presented the same to the next Justice of the peace: and if any person occupying land adjoining to any such highway, have cast the scouring of any ditch thereof into the high way.

If any Bailifes, Constables, Surveyors, or Churchwardens, have not levied the forfeitures for the offences aforesaid, and imploied them upon their said highwaies and accounted thereof. 2, 3 P. and M. c. 8, 5 Eliz. c. 13, 18 Eliz. c. 9, 27 Eliz. c. 11.

Highwaies in the Weald of Kent, Sussex and Surrey. If any Owner, Occupier, or Fermor, of any maner of yron worke, have not (for every three loads of Cole or myne, and also for every tun of yron that he hath caused to bee carried by any waine or cart, between the 12. of October & the first of May, by the space of one mile through any High way within the Weald of this Countie of Kent) paid 3. s. 4. d. to the Justice of peace dwelling neere the place where the High waies were most annoied: and have not likewise (for everie thirtie loads of coale or mine, and also for every tenne Tunnes of Iron so caried there, betweene the first day of May and the xii. of October) caried and laid one load of sinder, gravell, stone, or chalke, in such place of the said highwaies, as was by such Justice, or (in his default) by the Surveyors of the highwaies there, appointed therefore, or else iij.s. in mony for every such load so due and not caried to the hands of the said Justice, or Surveyors, within eight daies after demaund thereof at his said Iron worke.

And if any of the last said Surveyors have not so appointed the place, or have not demanded the said mony, or have not at the next quarter Sessions of the Peace presented the default thereof. 39 Eliz. cap. 19.

Unlawfull games. If any person have (for lucre) mainteyned or kept any common house, alley, or place of bowling. coyting, cloth, cailes, tennis, dicing, tables, carding, shovegrot, or any other game prohibited by any former statute (as football and casting of the stone) or any other unlawful new game now invented: if any Artificer of any occupation, or any Husbandman, Apprentice, Labourer, Servant at Husbandrie, Journeyman, or any Servant or Artificer, or any Mariner, Fisherman, Waterman, or serving-man (other than of a Nobleman, or of him that may dispend C. li. by yeere, playing within the precinct of his Masters house) have plaid out of the Christmas at any of the said unlawfull games, or in the Christmas out of the house, or presence of their master. 33 Hy. VIII. c. 9., and vide 12 Rich. II. c. 7 and 10.

Crossebowes and Gunnes. If any person have shot in, used, or kept any hand gunne, but such as in stocke and gun one yard long: or any hagbut or demyhake, not being three quarters of a yard long. 33 Hy. VIII. c. 6.

If any person (not having C. li. revenue by the yeere) have caried in his journey any crossbow bent, or Gun charged, unlesse it be to the musters: if any person have shot at large (other than at a but or banke of earth in place convenient) at any thing with any gun in any Citie, Borough, Market towne, or within a quarter of a mile of any of them, or have commanded his servant to shoot in crossebow, or gun, at anything other than a but or banke of earth: or if any person (not having C. li. by yeere, or not dwelling within five miles of the Sea coast, or not dwelling in a house two furlongs distant from any Citie, Borough, or Towne) do keepe or have in his house any Crossebow. 33 Hy. VIII. cap. 6.

. . . . . .

If any person (having C. li. by yere, and having seised any crossebow or gun by vertue of this Act) have not broken the same in pieces within xx. daies next after such seisure. Ibid.

Archerie. If any Marchant stranger, being of any Countrey from whence bowstaves have been or ought to be sent into this Land, have not (for everie tun weight of burden that his vessell conteyneth) brought hither foure bowstaves. 12 Ed. IV. c. 2, 33 Hy. VIII. c. 10, and 37 Hy. VIII. c. 7, and 13 Eliz. c. 14, and for everie But of Malmesie tenne bostaves. 1 Rich. III. c. 11.

Archerie. If any man being the kings subject, and not having reasonable cause or impediment, and being within the age of lx. yeeres (except Spirituall men, Justices of the one bench or other, Justices of Assises, and Barons of the Eschequer) have not a long bow and arrowes readie in his house, or have not used shooting therein: or have not for every man child in his house (between vii yeeres, and xvii of age) a bow and two shafts, and for every such being above xvii yeeres, a bow and foure shafts, or have not brought them up in shooting: If any man under age of xxiiii yeeres, have shot at standing pricks: or (being above that age) have shot at any marke under eleven score yards with any pricke shaft, or slight.

Butte. If the inhabitants of any towne have not made and continued their Buts as they ought to doe.

Bowyers. If any Bowyer have not for everie Bowe that he made of Ewe, made also foure other Bowes of apt wood to shoote in: Or have not sold his Bowes for all ages, at their due prices: If any stranger borne, not being a denizen, have used to shoote in a longe Bowe, without the King's licence: Or have conveyed out of his Majesties Dominions, any longe Bow or shafts, without such licence. 33 Hy. VIII. c. 9.

Horse for Apparell. If any Temporall person of full age (whose wife not being divorced, nor willingly absenting herself from him) doth weare any gowne or peticote of

silke, or any velvet in her kirtle, or in any lining or part of her gowne (other than in cuffes or purfles) or any Frenchood, or Bonet of velvet, with any habiliment, paste or edge of gold, pearle, or stone, or any chaine of gold about her necke, or upon any her apparell, have not found and kept a light horse furnished, except he hath been otherwise charged by the statute to find horse or gelding. 33 Hy. VIII. c. 5.

Musters. If any person being generally or specially commanded to muster before any (having authoritie for the same) have without true and reasonable cause absented himself, or have not brought with him in a readinesse, his best furniture of array, and armor of his owne person. 4, 5 P. and M. c. 3.

Captaines. If any person (authorized to muster, or to levie men for the King's service in warre) have taken any regard for the discharge or sparinge of any person from that service: or if any person having charge of men for warfare, have not paid to his Souldiers their whole wages, conduct, and coat money, or have for any gaine licenced any of them to depart out of the service. 2 Ed. VI. cap. 2 *ibidem.*

Souldiers. If any Souldier serving the King in his warres, have given away, wilfully purloyned, or put away any Horse, gelding, mare, or harnesse, wherewith he was set forth. 2 Ed. VI. c. 2.

Horses and mares for breed. If any person have put to feed in any Forrest, Chase, Moore, Parish, Heath, Common, or wast ground, within this Shire, where any Mares are used to be kept, any stoned Horse, being above two yeeres old, and not being xiiii handfuls high, betweene the lowest part of the hoofe, and the top of the wither: If any such forrest or grounds have not beene yeerely driven within fifteene daies after Michaelmas by the owners or officers thereto appointed. 32 Hy. VIII. c. 13.

. . . . . .

Seawatch. If watches have not bin made upon the sea coasts in such places, and with such number of people, and in such maner as it was wont to be. 5 Hy. IV. c. 3.

Parliament. The Statute of levying the wages of the Knights of the Parliament (made 25 Hy. VI. c. 11) hath no common use, and is therefore pretermitted. *Note also that these Statutes following are to be openly published at any Sessions of the Peace*, viz.

Purveyors. The Statute (36 Ed. III. c. 2, 3, and 4) shall be proclaymed by the Justices of Peace everie yeere, and thereof they inform the people. 23 Hy. VI. c. 2.

Victualers. All former Statutes for Victual being in force shall be proclaymed two times yeerely in the Sessions of Justices of the Peace. 23 Hy. VI. c. 13.

Archerie. The Act for Archerie, 33 Hy. VIII. c. 9, must be proclaymed at the severall Sessions of the peace.

II

THE WILL AND TWO CODICILS OF ROGER FLORE OF LONDON AND OAKHAM GIVING DIRECTIONS TO THE FEOFFEES TO USES OF THE TESTATOR'S LANDS

(*The Will was written on April 15th*, 1424, *the first Codicil on April 18th*, 1424, *and the second Codicil on October 28th*, 1425; *and all were proved on June 20th*, 1428)

F. J. Furnivall, Fifty Earliest English Wills (E.E.T.S.) 55-64

Testamentum Rogeri Flore [*In margin*].

In dei nomine Amen. Ego, Rogerus Flore, miser et indignus, de Okeham, compos mentis, laudetur altissimus, xv° die Aprilis, Anno domini Millesimo

cccc^mo xxiiii^to, condo testamentum meum in hunc modum. [*A leaf and* 3 *quarters Latin testament follows, with appointment of Executors, and on the back as follows :*] Et ad istam execucionem bene et fideliter faciendam ordino et constituo Johannem Clerk de Wyssenden, Radulphum Humberstone de leicestria, Ricardum Hawey, Magistrum cantarie de Manton, et Willelmum Baxtir, custodem Hospitalitatis de Okeham, Executores meos, ad disponendum et exequendum testamentum meum et voluntatem meam predictas, cum supervisione Henrici Plesynton[1] militis, prout velint coram summo Judici respondere.

Codicillus ejusdem Rogeri. [*In margin*].

In the name of almyghty god, fader and sonn and holy gost, Amen.

I Roger Flore of Okeham, declare my last will in this bille, als well of my testament as of my landes that standez infeffez handes. [*Then follow the directions as to the testator's personalty which do not differ in form from the wills of which specimens have been given in vol. iii App. IV.* (2), (3). *The testator then proceeds to give directions to his feoffees as to the disposition of his lands as follows*] :—

And moreover, for als mykyl as at diverce feffementes that I have mad to diverce men of certeyn part of my londe, to the entent that they shulde do my wylle lyke as in sum wrytynges and condicions upon the same feffementes it is more pleynly conteyned. And also for als mykel as divers men haf joint astate whit me in diverce of my purchace be wey of truste for to fulfylle my wille whan I required hem, or declared it to hem. Nowe I declare here my laste wille, als wel to my said feffez as to my joint feffes :

First I wul and ordeyne that my joint feffez of my maners of Stenby and Braceby, withe here appurtenaunces, in Lincolneshire, suffre my wyfe Cecile have the profitez of theim alle the while she lyveth sool withoute husbonde. And if she take the mantel and the rynge, and avowe chastite,[2] then wul I that forthe withe my said joint feffes make her astate, for terme of hire lif, of the same too lordshipes, up condicion that she lyve sool, withoute husbonde ; the remaindre of the manar of Steneby, withe the appurtenaunces, to Thomas my sonn and heire, and to the heires of his body comynge ; and for defaute of heires of his body comynge, to the heires of my body comynge ; and for defaute of issu of my body comynge to my right heires. And the remaindre of the the saide maner of Braceby, withe the appurtenaunces, to James my sonn, and to the heires of his body comynge ; and for defaute of heires of his body comynge, to the heires of my body begetyn ; and for defaute of issu of my body begetyn, the remaindre to my right heires. And if my saide wif take hir an husbonde, thanne wul I that my said joint feffez make astate to Robert, my sonn, of my saide maner of Steneby with the appurtenauncez for terme of his moder lyfe Cecile, the remaindre of said manere withe the appurtenauncez to my sonn Thomas, and to the heires of his body comynge, and so forthe, as hit is declared afore. And if hit so be that my saide wif take the mantell and the rynge, avowe chastite as hit is saide before, and thereupone have astate of my said too maners for terme of hir lif, the remaindre forth as hit is before declared, than wil I that my joint feffez of my landes and tenementes that I bought of Richarde Oxenden in Okeham, and also that my joint feffez of my lande and tenementez in Mastorpe, and also my joint feffez of the burgate in the newgate of Okeham, the whiche I bought of Richarde Milnere, make astate of theim to Roberde my sonn afore saidè for terme of the lyf of his modere Cecile ; the remaindre of theim

[1] For the supervision of the mediæval will see vol. iii 566.

[2] For this ceremony see the Liber Pontificalis of Edmund Lacy, Bishop of Exeter (Ed. R. Barnes) 122-126, cited Furnivall, op. cit. 135-136.

to my sonn Thomas and to the heires of his body; and for defaute of issu of his body, thanne to the heires of my body; and for defaute of issu of my body, the remaindre to my right heires, so that my ful wille is, that if my saide sonn Robert haf not Steneby, that thanne he haf these other thinges as hit afore declarede.

Moreovere my wille is, that my joint feffez of my landes and tenementes in Brauntoft in Lyndeseye make astate of theim to Roger my sonn, and to the heires of his body comynge; and for defaute of [issue of] his body comynge, the remaindre to my sonn Thomas and to the heires of his body comynge; and for defaute of issu of his body comynge, to the heires of my body comynge; and for defaute of issu of my body, thanne to my right heires.

Also I wul that my joint feffez of my landes and tenementes, whithe there appurtenaunces, in Halton in Lyndesey, make astate of theime to Johnn my sonn, and to the heires of his body comynge; and for defaute of issu of his body, the remaindre to the heires of my body; and for defaute of issu of my body, forth to my right heires; so that my wylle is, that the remaindre of alle my landes and tenementes that I ordeyn to myn other childrenn fro myn heire, abide, for defaute of issu of theim, to myn eldest sonn and heir that over lyvethe hem, and thanne forth as hit is afore declarede.

Moreover my wylle is that alle myn enfeffez of other diverce of my landes and tenementes in Rotelande and Leycestreshire, als wel tho that stande enfeffede by me, as tho that ben joint feffede withe me, make astate of theim to my saide sonn Thomas and to the heires of his body comynge; And for defaute of issu of his body comynge, the remaindre to the heires of my body; and for defaute of issu of my body, the remaindre to my right heires, saf that I wul that myn enfeffez of my place that I wonne Inne, suffre my wyf wone ther Inne a yere after my decesse, if she wille, so that she take no husbonde in the mene tyme; And after that I wul that my saide enfeffez make astate therof to my saide sonn Thomas, as of the remenaunt it is afore declared. And if hit so befelle that my saide sonn Thomas died to fore these astates aforesaide made, thenne wille I that like astate be made to myn eldest sonn that thanne over lyvethe him.

And my wille is, that alle the astates beforesaide be made by dede endented, to that entent that one of the dedys mow be deliverede to him that the gyft shal be made to, and the other to myn heire, because of the remaindre. And I wul that myn heires dedys be kept with the remenaunt of my dedys in the same cofere that my dedys beth kept in nowe, and so delyvered him to his use; And I wul that the other parties of the dedys endentyd, with the remenaunt of the dedys that longen to myn other childre, be put in the cofre that Thomas Audeby gaf me, in the whiche my selver vesselle is now kept, til ilk childe come of age to receyve that longes to him; and that last shal receyve his dedes, I wil that he haf the cofre whitalle; so that I wil that they have no lyvere of theire dedys til they come til yeres of age and discrecion to resceyve hem. And if they died or thei came to suche age, thanne his dedes that so died were deliverede to myn heire. And I wolde that the substancialle[1] dedes of myn other childre were copied, and the copies put amonge myn heirs for a remembraunce. And if it might godely, I wolde alle the giftes aforesaide were done by fyn, for more swerte, on my cost.[2]

And my wil is, that thise astates be made al so sone as thei mowe godely after my decesse, and that my saide children have ilk of hem the profit of thaire lande that I ordeyn hem, forthewithe anone after my dirige. And I wul that the said cofre that myn other children dedes shal be kept in, be kept in the Almeshouse of Okeham, undre thre keyes, too under keping of myn

[1] Original.

[2] For the reasons for this see vol. iii 252-253.

Executours, and the thridde under the keping of an overseer of my testament, so that thei mow make deliveraunce to my childre of there dedes, as hit is seid afore.

I write no more atte this time, but that I prey to almyghty god als entirely as any synful man may prey, that of his endeles mercy and grace, through the preiers of oure lady seint Marye and alle the seints of heven, he haf mercy of my synful soule, and bring hit to his blis, and gyf myn Executors grace to make good ende of my testament, and wille, and my feffez also of my feffements, Amen. Writen withe myn owne hande the xviii day Aprille, the yere specefied in my saide testament.

And as touching the warde and mariage of Thomas Dale, my wille is, but if he and my doughtere Anneys mowe accorde by the assent of hire moder Cecile, elles I wil that the warde and mariage of him be solde to my profit There hit may be to his worshipe.[1] And I wil that the profit, that cometh thereof, helpe to fulfyle my testament and wille, if hit nede be, and elles be done for my soule by myne Executours. And if my said doughter Anneys and he accorde of mariage, Than wil I gyf hire the mariage, abatyng for hire c li. that I haf beqwethen hire be my testament lx li., the which I wil helpe to fulfilling of my testament and wil, if it nede, and elles be done by myn Executours for my soule and for alle cristen soules. And also I wil that John Oudeley haf a coveryd pece of silver, price of xls., or elles xls. to bie one whithe, of my cost, for a remembrance of me. My wille is also that my new vestment that I made last be delivered to myn Autere in the kyrke, there to serve and abide in remembrance of me while it wil endure, to the worshipe of god ; and Ihe [Jesus] mak gode ende.

[*The second Codicil*].

And for a moche as I Roger Flore, overseying my testament and wille, have conceyvede that I have not ordeyned what James my sonn shulde have during his moder lyf, soole. whithouten husbonde, therefore my wille is, that my joint feffez of my purchace of Leesthorpe in Leicestreshire, graunte by here dede, to James my saide sone, an annuite of c.s. of my saide purchas of Leesthorpe, to have it for terme of his moder lif Cecile, if she lyve sool, so that after here decesse, or if she take hire an husbonde, he mowe have the remaindre of Braceby, like as I have ordeinede for him in my wille, so that whanne the remaindre falleth to him, that thanne the saide annuite of an cs. sese. And I will that the said graunte of the saide annuite be grauntede withe clause of destresse paieable atte too termes, that is to say, at Esterne and Michelmesse

Furthermore my wille is, that if Robert my son be a prest in time to come seyng that thanne my lande that is taylede to him in Leicester, Whytewelle and Lital Hamildone shulde descende to the saide James, that thanne the remainder of Braceby afore saide be til William my sone after the decesse of his modere Cecile ; or if she take hire an husbonde, as hit is rehersyd afore. Moreovere my wille is, that if my saide sonn Robert be here aftire prest, as hit is saide before, thanne wil I, if he haf any benefice of holy chirche or prebende, that thanne the astate that I ordeignede that joint feffez of my londes and tenements that I bought of Richarde Oxenden of Okeham, and also of my burgage the whiche I bought of Richard Mylnere in the Newgate of Okeham, and my joint feffez of my lands and tenements in Masthorpe shulde haf made to Robert my sone for the terme of his moder lif in suche

[1] For the manner in which the rights of wardship and marriage were regarded as proprietary interests see vol. iii 61-64, 215. In this case the marriage is, if possible, to be used to settle the testator's daughter in life by providing her with a husband: if not it is to be sold.

manere and forme as hit is declarede in my formere wille, that thanne thay shalle make astate of the saide londes and Tenements to my saide sone William in suche manere and fourme as thei shulle have made to my said sone Robert, with the remaindre as hit is in my former wille declarede.

In witnes of whiche this my writynge of myn own hande, I have annexede this my wille withe my testament and former wille, under my seal of my armes, affermynge my saide testament and former wille except that is chaunged in this my last wille.[1]

Writen at Okeham the Fryday afore the fest of the aposteles, Seint Simon and Jude, the yere of oure lorde a thousande foure hundrede and xxv, and the yere of the reigne of King Henry the sext after the conquest, the fourte. And I prey my feffez that alle these astatys, by the avys of a wel lerned man of the lawe, of mv cost, to be paied by myn Executours. Almighty god make good end! Amen.

Probate fuit presens testamentum et codicillum coram Magistro Johanne Lyndefelde, Commissario etc. xx die mensis Junii, Anno domini Millesimo cccc^{mo} vicesimo octavo, et commissa est administracio omnium bonorum dicti defuncti dicto Ricardo Hiwey, et domino Willelmo Baxter, Executoribus in codem testamento nominatis, Reservata potestate, etc.

III

DOCUMENTS CONNECTED WITH THE STATUTE OF USES

LETTERS AND PAPERS. HENRY VIII. Vol. 56, fols. 36-39. Calendared in L. and P. Hy. VIII. Vol. iv. No. 6043 (6)

(1) THE DRAFT BILL OF 1529

[I have divided this document into numbered paragraphs for convenience of reference. In the original there is no such division. I have punctuated both this and the succeeding documents.]

(1) For as moche as long before thys tyme hathe ben and yett to this present day there is grete trobull vexacion and unquietness amonges the kynges suggettes withyn this hys nobyll realme of Inglonde, whiche trobull moste comenly risith amonges the sayde suggettes for tytyll of londes tenementes and other hereditamentes within thys hys realme, as well by intayle as by uses and forgyng of false evidences, whiche all is so secretely done that men can nott com to the trew knowledge therof for lake of good and holsum lawis provided for the same, by whiche the purcheser or biar may have perfett knowledge in what case and condicion the premisses stond, to the grete dishonor of owre soverayn lord the kyng, all his realme, and to the intollerable costes and charges and utterly undoyng of a grete part of his feyghtfull suggettes within this hys realme.

(2) FOR REMEDI wherof and for augmentacion of Justes be hytt In actyd by owre soverayn etc. that, from the fyrst day of Janiver next coming forward for ever, all intayles made of londes tenementes and all other hereditamentes be utterly frustrate disannulled and adnichelate for ever, as well intayles before thys day made as any hereafter to be made so that all manner of possessions be in state of fe simple from this day forward for ever.

(3) FURTHERMORE be ytt inactyd by like auctorite thatt no use nor

[1] The testator here uses the word "testamentum" to mean "will"; and the word "will" to mean "codicil," see vol. iii 537.

uses hereafter to be made to any person or persons upon or for eny possescions within thys realme be vayleable or of eny effect in the law, nor that no manner of person schall take or reseyve any profett or benefite of the same, onles the same use be recorded in the kynges courte of the comen place, and that the officer or officers therfor deputed schall kepe for everi schere within thys realme a particuler Rooll or boke to the intent that the purcheser and all other may com to the knowledge therof by the sayde recordes, and that the officers therfor deputed schall take to the kynges use for suche record ij s. sterling and nomore, and for the regestring and writyng thereof for everj viij lines being of x inches long j d. sterling and no more.

(4) AND be hyt further enactyd by like auctorite, to avoyde all untrowthe for forgyng of evidences, that every purcheser schall,[1] immediately after the partie that sellyth hathe selyd and fermid the deade of geft of any londes tenementes for [sic] other hereditamentes so sold and poscession thereapon taken with sufficient recordes, that then the sayd dede to be openly red apon a holy day next folowyng in the parische cherche or cherchis in whiche parische or parisches the sayd lond schall ly, att suche tyme as moste people is present, and so red, the vicar parische preste or curate to fyrme the sayd deede, to the intent that the most parte of the parische may knowe of the sayde sale and possession so made and gevyn ; and for further suerte that the sayde deede be regestred in the schere towne In whiche schere the sayd lond schall lye, and the mayre bayliff or other hee officer of suche schere towne to sett to the seale of the towne or suche a seale as therfor schall be ordened and apoynted, and they to take for regestryng and sealyng of the same ij s. sterling and no more.

(5) Provided allways that this act nor nothyng theryn conteyned be in any wise preiudiciall to the nobyll men of thys realme, being within the degree of a baron, butt that theyr londes and possessions may remayne Intayled as hitt now is or hathe ben in tymes past, and that no maner of person or persons presume to by any such noble mens inheritans within the degree aforesayd, except the sayd noble man have fyrst obteyned the kynges licens under hys brode seale therfor ; the whiche obtayned, hytt schall be lawfull as well for the sayd nobull man to sell as to any of the kinges naturall borne subiectes to by and purchesse the same ther londes tenementes and other hereditamentes, withowte any preiudice of any of the parties.

(6) AND be hitt further inacted by like auctorite thatt londes tenementes and other possescions so purchased, being the dede openly redde in the parische or parisches where the lond lieth, subscribed by the curate registrid, and sealid in the schere towne as is afore sayd, schall not be devict evict or recoverid owte of the power and possession of hym that so hathe purchased them In no court or courtes within the kynges realme, butt thatt he thatt is so possessed, as is aforesayd, schall peasably possess and inioy the same to hys heyrys and assines for ever.

(7) AND further be hytt inactyd by auctorite aforesayd thatt all manner of londes tenementes and other possessions of the whiche before thys tyme Recovery hathe ben had or fyne leveyd apon, and v yeris past after the recovery or fyne, be taken for fee symple in the law, to the possession of hyt for ever, any law or costume herto fore made or used to the contrary notwithstandyng.

(8) AND be hitt further inactyd by the auctorite aforesayd that every manner of person beyng seisid of londes tenementes and other possessions, of whiche hys anciters or predecessors have ben peasably seased and possessed by the space of xl yeris Immediattly afore, withowt any clayme made by dew course of the law within the sayd tyme, thatt then from thens forthe no action

[1] The grammar is somewhat faulty.

to be admitted in no corte or corttes withyn thys realme to disposses any person or persons so possessid, butt that the possessor schall injoy the same to hym hys heyris and assines for ever.

(2) THE AGREEMENT BETWEEN THE KING AND THE NOBILITY, 1529. COTTON MS. TITUS B. IV. Fols. 114 (121)-118 (125). Calendared in L. and P. iv. No. 6044.

[I have added the numbers to the various paragraphs]

Articles condescended and agreede by the Kinges Heighnes and the noble men of this his Realme of England being assembled in this present Parliament begunne in the third day of November in ths xxjth yere of his most noble reigne to be ingrossed in due forme And to be enacted by autho : of the same Parliament in the next full Court thereof, after the prorogacion of the same hereafter to be had.

HENRY R.

1. First, yf any person hold landes of estate of inheritance of the Kinge in Cheife by knightes service, and other landes of other lordes or persons, And dyeth seised thereof, (his heyre beinge within age) the Kinge, accordinge to his owne lawes, shall have the wardshipp of the whole heretage, Except the Fees of the Archbishopp of Canterbury and of the Bishopp of Duresme betweene Tyne and Tese.

2. Item, if any man have landes of like estate holden of the Kinge in Cheife by Knightes service, and other landes holden of other men by like or other service, and all be in Feoffment or Recovery to his use, and he dyeth, (his heire beinge within age) no will joincture or other limitacion of use thereof declared, the King to have the whole in ward.

3. Item, if any man have landes of like estate holden of the Kinge by Knightes service in Cheife ; And other landes holden of other men by Knightes service or otherwise, And all beinge in recovery or feoffment to his use, and dyeth (his heire beinge within age) the King shall have the third part of all those landes and Tenementes, notwithstandinge any will Jointure or other use to the contrarie hereafter to be lymited or assigned.

4. Item, if any person have landes holden of the Kinge by Knightes service in Cheife, and much other landes holden of other men in Socage or otherwise, and the owner declareth his will or by Jointure, or otherwise doth put in use but part of the landes holden of the Kinge or of the other Lordes, The Kinge shall have all the residue, whereof no will or other use is then declared or made, If it be better then the third part of the whole landes, or else the King to have the third part of the whole landes at his pleasure.

5. Item, if any man havinge landes holden of the Kinge by Knightes service in Cheife, which landes extende not to the third part of his whole landes, And he maketh his will or other limitacion of use of all other his landes, or of so much thereof, as the residue shall not be the third part, The Kinge shall have the landes holden of his Grace, and as much of the residue as the one with the other shall amount to the very third part of the whole landes.

6. Item, if any heire beinge within age, and in the Kinges ward by reason of landes holden of the King by Knightes service in Cheife, and so beinge in ward, any Tenante for terme of life or in dower, whereof the revercion or use thereof was in the same Auncestor, dieth, whereby the possession or the use of the possession cometh to the same heire (he being within age), The Kinge shall have those landes wholely, if no further will be by the same Auncestor thereof declared to the contrarie.

7. Also of all other landes and Tenementes holden of the Kinge by

Knightes service, by reason of any Escheate honor or otherwise and not of the Kinge in Cheife, The Kinge shall have the third part of the same landes and tenementes so holden of him by Knightes service, and not in Cheife, Any will use or Jointure to the contrarie hereafter to be made notwithstandinge, And if no will use nor Jointure be thereof made then the Kinge to have all the said landes and Tenementes so holden of him.

8. Item, as to sueinge of Lyveries by the heire which was in the Kinges ward, The heire, beinge at full age, by himselfe or his Attorney, cominge into the Chauncerie within three Monethes next after that he shall be of full age, and findinge sufficient sueritie to paie the Kinge the third part of the profittes of one yere of all such landes and tenementes whereof the Kinge took profittes by reason of his noneage, to be paid at such daies as shall be agreed with the Kinge or his Counsell assigned to survey such lyveries, the same heire shall have his liverie thereof with the whole proffitt from the time of his full age.

9. And in case that such heires, which was in the Kinges ward, doe not make such suite as is beforesaid for his livery within the said time of three monethes, then the Kinge shall have the whole proffittes of the landes and tenementes wherof the Kinge tooke proffittes by reason of his noneage, after the rate of the tyme as longe as it shall so remaine in his handes, and unto the time the heire shall have sued lyverie as is aforesaid.

10. And in case that any such heire will sue any livery of any revercion or use of revercion which decended or came unto him while he was in the Kinges ward, the same heire shall paie to the Kinge, for his Liverie of that revercion, the third part of one yeres valewe of the same landes and tenementes so beinge in revercion, And whereof he doth sue his liverie.

11. Also if any such heire will not sue his livery of such revercion or use o revercion till the possession thereof in deede or in use falleth or cometh unto him, And shall paie for his livery thereof the halfe of one yeres proffittes thereof, And shall sett in suertie therefore as is aforesaid, And if he doe not sue for his livery thereof within the said time of three monethes, the Kinge shall be answered of the meane proffittes thereof, from the death of the Tenante for terme of life as is aforesaid till he shall have sued his livery thereof.

12. Also if such heire be of full age at time of death of his Auncestor, if he come into the Chauncery within three monethes next after the death of his Auncestor and there sue for his livery, and put such suerties as is beforesaid to paie to the Kinges grace the moitie of one yeres proffitt of the whole heritage which to him descended from his Auncestor in possession or in use, Then he shall have his Liverie thereof with the yssues and proffittes from the death of his Auncestor, And if any such heire sue not his said Liverie within the three monethes as is aforesaid, then then [*sic*] the King shall be answered of the issues and proffittes of those his landes from the death of the Auncestor unto the time that Liverie thereof shalbe sued in manner and forme aforesaid.

13. Item, in case any heire will sue Liverie thereof of any revercion that shall discend to him from the same Auncestor, be it sued in the life of the tenante for terme of life or of other particular estate or after the same Tenantes decease, the same heir shall paie to the Kinge for his livery thereof, the halfe part of one yeres value of the same landes and tenementes so beinge in revercion, whereof he so shall sue his liverie, the same liverie of the revercion to be sued within the monethes as is above said of landes in possession.

14. Also it is condescended and agreede That if any manner of person, of whatsoever estate degree or condicion he or she be, havinge or which shal have any landes tenementes or hereditamentes houlden of the Kinge his heyres or Successors, make or cause to be made any guift in taile to his heyre apparant or to any other to his use of any of his landes or tenementes

or an other thinge doe or cause to be done whereby the Kinge his heyres or successors should or might be evicted or excluded from any benefitt or profitt of ward primier seison or liverie contrarie to the effect and plaine meaninge of any of the Articles above written, Or if any other imaginacion or invencion hereafter shall be found contrived or devised contrarie to the same, yet, that or any such thinge notwithstandinge, the Kinges heighnes his heires and successors shall have the full benefitt and effect of his wardes of the bodyes and landes and of primier seisons and liveries, accordinge to the plaine and true intent of the said Articles and every of them.

15. And in like wise, if at any time hereafter imaginacion devise or invencion shall be found or contrived for the Kinges heighnes his heires or successors, whereby it shall be pretended that any larger or more profittes or advantages concerninge his or theire wardes primier seasons or liveries should or might growe to Kinges heighnes any [*sic*] of his heires or successors then by the plaine and true meaninge declared by the Articles abovewritten is limited or appointed, yet, that notwithstandinge, the Kinges heighnes is contented that it shalbe enacted that his Grace his heires and successors shalbe pleased to accept and take the benefittes and profittes before limited by the said Articles, and none other more or larger.

16. Also it is condescended and agreed that every of the said noble men and other the Kinges Subjectes, assentinge to the Articles above written, for suerties hereafter to be had and made of Joyntures willes or other uses of landes tenementes or hereditamentes, shall or may sue writtes of Right out of the Kinges Chauncery against the tenementes [*sic*] in possession or in use or against the partners [*sic*] of the profittes of the landes or tenementes to be recovered, payeing for every such writ like fyne onelie, and none other, as hath beene used to be paid for or uppon writt of Entry in the Post heretofore used to be sued by an assent of parties, And uppon such writtes of Right to have Recoveries accordinge to the lawe of this Realme.

17. And that every such Recovery shall be a barr against every Tenant vouchee and person joyeninge in aide named in the same Recovery and theire heires, for every estate and title of Fee simple or Fee taile of or in the landes or tenementes so recovered, which any of the same tenantes vouchees or persons joyeninge in ayde had or pretended to have in possession or in use at the time of the same Recovery.

18. Also it is condescended and agreed that if it happen any of the said noble men or other Lords or person agreeinge to the said Articles to decease hereafter and before that the said Articles shall be in due forme enacted by Authorities of Parliament as is aforesaid, Neverthelesse the said Articles shall take full effect betweene the kinges heighnes and the heire or heires of the person so deceased, in as ample and full manner and forme as if the same Articles were in deede enacted by authoritie of this present Parliament.

19. Also the Kinges heighnes is pleased That it shall be enacted that every of the said noble men, And all other his Subjectes and theire heires and successors of whome any landes or tenementes be or shall be holden by Knightes service, shall have full benefitt and proffitt of the wardshipp of the third part of the whole of the same landes or tenementes holden of the Kinges subjectes as the case shall require, as by the said Articles is devised for the Kinges heighnes his heires and successors of landes and tenementes of him holden by Knightes service and not in cheife.

20. Item, it is agreed and declared that, in every case which shall happen by the Articles above written, whereby the Kinge shall be intytuled to whome [*sic*] the third part of landes and tenementes, as is above written, that third part shall be due to the Kinge his heires and successors onely in cases where the Auncestor shall dye his heire beinge within age, And in every such case,

if the Kinge have not this full third part of the whole heritage by the landes and tenementes descended in use or in possession, then the Kinge may take, for accomplishment of the same third part, of the landes appointed to the performacion of the said Auncestors will, if those lands will thereunto suffice, or or else the Kinge to take those landes and asmuch of the other landes which shalbe appointed for the Joynture or other use as the one with the other will extend to the full third part of the whole heritage.

21. Also it is condescended and agreede that, of dowers Joyntures and other particular estates for terme of life in use or possession heretofore made, the Articles abovewritten shall not extend to give the Kinge any profitt or advantage duringe the life of any such particular tenant, but that the Kinges Interest and title shall beginne and take effect to have the third part, or the moyty thereof as the case shall require, immediately by and after the death of the same particular tenante, and not before.

22. Also it is condescended and agreede that the Kinges heighnes and every other Lord shall have advantage of Gard per cause de Garde after the nature of theire tenures, accordinge to the effectes of the rates limited by the Articles above written, and that no benefitt or avayle shall be taken or claymed by the Kinges heighnes or any other Lord for the marriage of any heire beinge married in the life of the Ancestour, (The parties so beinge maried beinge of the full yeres of consent at the time of deaih of the same Ancestor), otherwise then according to the Kinges lawes in like cases heretofore used.

23. Also it is agreede That every heire which shall sue liverie by the Articles abovewritten, beinge beyond the Sea at the time of the death of his Auncestor, shall have the time of fyve monethes to make sute for his liverie, Any thinge abovewritten notwithstandinge, And that every such or other heire aforesaid shall be at libertie by himselfe Feoffees or recoveries, [*sic*] beinge seised to his use, to sue a generall liverie or a speciall liverie, paieinge for every such liverie after the rates above written.

(Signed) HENRY R.

Thomas More Cancellarius		Charlys Suffolk.[1]
Thome Dorset.	T. Norfolk.	
John Oxynford.	H. exetoir.	W. Arundoll.
Thomas Rutland.	E. Derby.	H. Worcester.
Arthur Lyssle.	T. Wylsher.	Robert Sussex.
T. Berkeley.	G. Bergevenny.	Audelay.
Harry Morley.	Henry Mountagu.	William Dacre.
John Berners.	Edward Grey.	William Graye.
T. Darcy.	W. Mountjoy.	Herry Daubney.
A. Wyndesore.	T. Mountegle.	John Husey.
Edmond Bray.	T. Wentworth.	Thomas Burgh.

The signatures are not autographs, but are probably intended to represent copies of the autographs.

(3) THE EVIL CONSEQUENCES OF USES. LETTERS AND PAPERS. HENRY VIII. Vol. 101, fo. 282. Calendared in L. and P. Hy. VIII. Vol. x. No. 246 (3)

[I have added the numbers to the paragraphs of this document.]

Here after Folowyth a small parte (in regard) of ye myscheiffes wronges and in Conuenyensez which ye Kinges Subiectes do suffer by suffraunce of usez within this realme.

[1] Wrongly copied "Sussex," L. and P. iv no. 6044 n.

(1) Fyrst, yᵉʳ is no accion ayenst hym or them which have ye use but by statutez, wheirapon do ryse such doutes thatt no man can be sure of any land lawfully purchesyd by lawffull barganyng.

(2) Item, ye openyons of ye Justices do chaunge dely apon the suertyez For landes In use.

(3) Item, yᵉˢ usez causyth ye Justices to be in doute or in seuerall openyons In ye most Commen casez, as In case a man have dyvers Feffez to his use of landes In dyvers Townez within one shyre, and he do make a deed of Feoffment of all ye seyd lendes and make leuery but in one Towne, this grettly doutyd whether all ye lond pass or but thatt land whereof he made leuery.

(4) Item, if a recouvery he had ayenst *Cestui a que use* In Tayll, whether this shall bynd after his deth or no is also in doute amonge ye Justices.

(5) Item, if a man ougth to have a reall accyon, For yes secrett Feffmentes to usez he can nott Tell ayenst whom to brenge his accyon but ayenst hym thatt Takyth ye profeffettes, and if he breng nott his accyon within a yere he hath no remedy in ye most parte of accyons.

(6) Item, if a man hauyng neuer so much landes In use be bound and his heres In an obligacyon and dye, hauyng nott goodes suffecyent to satysfye the obligacyon, his heir, tho he haue ye use of a thousand pounde land, shall nott be chargyd with no parte of the sayd obligacyon, and yett if ye land had dissendyd he should haue made Satysfaccion For ye seyd dett.

(7) Item, ye usez cause much landes to come into mortmayn and to Fyndyng of prestes.

(8) Item, usez cause landes to passe by wyll commenly when he that makyth ye wyll knoweth nott whatt he doth nor his gostly Father whatt he wrytyth.

(9) Item, if a man makyth a wyll of his landes and goodes, and hytt is prouyd in ye speretuall Court that he had nott att ye makyng of ye wyll such perffett mynd *qualem Testantez debent habere*, all shall be made voyde and yat by ij wytnesez.

(10) Item, he thatt hath Feffez to his use doth apper to be owner and Tennant and is nott, by reson wheiroff many be disseuyd In barganyng with them, and many poore Fermers undun, and many old seruyng men In yer age put From yer offices and anuytez beffore grauntyd them in recompens of yer seruyce doyn in youth.

(11) Item, yes usez doth undo many Wood salez wherfore money is payed.

(12) Item, I omytt ye grett nombre of doutes which doth ryse by usez.

(13)[1] Item, where, *per Cas*, Some one man takyth asyngler welth their be be a hundrioth against one that takyth hurt and losse theirby, is yt a good lawe?

(14) Item, if a man see and consyder the matterz nowe hyngyng in varyaunce in euery the kinges Courtes and in arbitrement, he shall Fynd yt yes decetfull usez is the cause the most parte of the seid varyaunce.

(15) Item, if the usez, which is in Regard but ye shadowe of the thyng and not ye thyng Indeyd, were clene put out of the lawe men yᵃᵗ had right should hereaftur rather come to there remedyes.

(16) Item, yes usez defraude wemen From dowers and men which mary we [men] Inherytable or Inherytors For yᵉʳ Interestes as Tenent by the Courtesy.

(17) Item, if a man put a maner enfeffment, to which an aduouson is appendent, be hit neuer so grete in value, he nor his heirez can nat present, and iff he do he is a wrong doer, and so hit is if hit be an aduowson In gros, wᶜ is grete myscheif and makyth trouble oft.

[1] Here the handwriting changes.

(18) Item, if a man which hath Feoffes to his use do comande one of his seruantz or Freyndes to Cut downe a Tre in his grounde. or licens a pore man to cut downe a Tre or put his bestes in his grounde, the Feffez may punyshe the seid seruant by Fyne and Imprisonment or utlary or Inditement in the sessyons of peace.

(19) Item, if A. B. haue Feffez to his use, and an estranger put his bestes upon the grounde, A. B. takyth the bestes In his grounde or percas In his Corne and dryuth them to pounde, he that ought the beystes shall punyshe A. B. for takyng the seid bestes.

(20) Item, wheirby the lawe of ye Realme if a man do Treson murdre or Felony, in example of other, the Kynge or the other lordes should haue his landes, nowe *Cestui que use* commyttyng Treson felony or murdre, shall Forfett no lande by e Commene lawe, to the grete boldness of evyll persons.

(21) [1] Item, if *Cestui que use* be outlawed, the kyng ougth, if he had the possession, to haue ye profettes of his landes, and nowe ye land, beyng In use, he can haue nothyng.

(22) Item, if landes dissend unto ij or mo wemyn wᶜ mary, if the one husband be of more power than ye other, and Takyth ye hole proffettes or ye grett parte, or Fellyth all ye woodes, yer is no remedy by ye commen lawe of ye realme, nor he thatt is wrongyd can nott compell the other to make protecyon nor seueraunce.

(23) Item, *Cestui que use* doth occupye the grounde and makyth lessez, if ye lesse do lett downe housez or cut downe woodes, he hath no accyon of wast nor other remedy by ye lawe.

(24) Item, he that hath ye use can nott haue accyon of accompt nor other remedy ayenst his baylyez nor Ferners.

(25) Item, In all accions of Transgressiones accompt or other accyon personall brougth by . . . the Feffez, if any one of them wylbe currupt and relez, all ye matter is lost and all ye other barred For euer.

(26) Item, *Cestui que use* can not make a good quytaunce to his bayly when he hath payd hym his rent.

(27) Item, women wich haue ionturez For their lyuez and Feffez to yer usez, mey cut downe woodes and pull downe housez and no remedy by ye lawe.

(28) Item, yes Feffementes to usez cause many deleys by essoynes vouchers and other wyse In reall accyons, wheirby men be oft Infenytely of their lawffull Rigth deleyed.

(29) Item, all yes Feffmentes to usez and ententes began Fyrst apon Fraude and disseytt, wᶜ is nott meytt to be made nor allowed For a lawe.

(30) Item, if aman haue Feffez to his use, and one of his Feffez be unthryfty and be bounde in a statute, ye land shalbe In execucyon For ye porcyon of ye landes of *Cestui que use.*

(31) Item, if the suruyuor of ye Feffez dye, his wyff shalbe Indowed of ye iijᵈᵉ parte of other mens landes, and iff ye heir be within age, ye lord etc. shall haue ye ward ofye resedowe of the land etc.

(32) Item, ye usez make double lawe, and cause thatt yer is no remedy att ye comen lawe, For *Cestui que use* can not sue att ye comen lawe.

(33) Item, *Cestui que use* might make no leez graunt Feffment nor relez to be good beffore ye statute of Richard ye therd, apon which do ryse agrett nombre of doutes and myscheffes.

(34) Item, yᵉʳ would no accyon lye ayenst *Cestui que use* beffore ye statutes of pernors of proffettes apon wich doth ryse many doutes and unsuertyez.

(35) Item, *Cestui que use* can haue no accyon by ye lawe, and yett he semyth Tenant and owner to ye world, which is agrett disseytt.

(36) Item, Fynally the usez began apon disseytt, and ye most thatt

[1] Here the original writing begins again.

followyth yerof is disseyt, so thatt, ye disseytes thatt be their In, I wyll unthertake shall conteyne a grett boke, if yer be well serched out with study, so thatt ye usez subuerte ye lawe and Customez of yis Realme.

(37) Item, here fowith For whatt purpose and entent Feffementes to usez haue byn practysed within this realme.

(38) Fyrst, to ye Intent and euyll purpose that if a man of power gatt ouer ye possession of landes, albe thatt hytt were by wrong, yett, if he were able to kepe ye possession, he would make so many Feffmentes, thatt the partye that shoulde shewe, mygth neuer knowe ayenst whome to breng his accyon, and so without remedy by ye Comen lawe of ye realme.

(39) Item, to ye entent To dyffraude ye lord of whom the land is holdyn from ward maryage and releyffe, And to ye entent that ye cheif lord should nott knowe apon whatt person or persons to adouwe, For his rentes Customez and seruyces dewe.

(40) Item, to ye entent that if a man dyd Treson murdre or Felony thatt he should Forfett no land.

(41) Item, to ye entent that all recouerey in accyons reall ayenst hym should be voyde.

(42) Item, to ye entent thatt, if any recovery were had in any accyon personall For dett or otherwyse, thatt yer should be no execucyons of ye landes.

(43) Item, to ye entent thatt no man should knowe of whom to take a leez gyfft or Feffement, For their [*sic*] Fraudez and such lyke were usez deuysed.

Endorsed :—"Damna usuum," and "Inconveniences for sufferance of uses."

(4) THE PROPOSED ALTERNATIVE TO THE STATUTE OF USES. LETTERS AND PAPERS. HENRY VIII. Vol. 101, fo. 286. Calendared in L. and P. Hy. VIII. Vol. x. No. 246 (4)

[I have added the numbers to the paragraphs.]

For as moche as by reason of uses lately practised in this realme, the good old lawes of the same be nygh subuertid, to the derogacion of the Kinges crowne and hurt of his people and Subgettes of this realme, Be it therfor enactid, by auctorite of this present parliament, as herafter ensueth in these articles folowyng.

(1) First, if eny person or persons, hauyng the use of eny londes tenementes or hereditamentes, be atteyntid or convict by the dewe course of the lawes of this realme of eny treasons murdres or felonyez or eny other offencez wherby londes ought to be seased lost or forfit, shall in euery suche case lose and forfit the londes tenementes and hereditamentes, whereof suche person or persons so offendyng shall haue suche use att the day of suche offensez don on eny tyme after, in like maner forme and condicion in euery behalf as if suche offendor, hauyng suche use, had had suche estate in possession reuision or remaynder in the said londes tenementes or hereditamentes so to be seased lost or forfit, as he had in the use.

(2) Item, if eny man mary a woman hauying the use of eny londes tenementes of hereditamentes in fee simple or intayle, and after suche mariage haue issue by the said woman, and she dieth, the husbond shalbe tenant by the courtesy of the same londes tenementes and hereditamentes, so beyng in use, in like maner forme and condicion as if his wife had had suche estate in the possession of suche londes tenementes or hereditamentes as she had in th'use.

(3) Item, if eny use of londes tenementes or hereditamentes discend in fee simple to eny person or persons from their auncestors, that then, in euery

suche case, the heir and heirez, to whom suche use shall discend, shalbe bounden to all accions execucionz, and to all other intentes whatsoeuer, in like maner forme and condicion as suche heir or heires shuld haue ben bounden, if the auncestors had died seased of the possession reuersion or remaynder of suche londes tenementes or hereditamentes so discendid in use.

(4) Item, euery person and persons, hauyng the use in eny londes tenementes or hereditamentes, shalbe admytted taken and reputid, in all condicions[1] and to all ententes and purposez, tenantes to the chife lerdes of whom the londes tenementes or hereditamentes, wherof they haue suche use, shalbe holden, in like maner forme and condicion in euery behalf, as if they had had suche estate in the possession reuersion or remaynder of the londes tenementes or hereditamentes, whereof they haue suche use, as they haue in the use, and that all recoueryez had or herafter to be had ageyn them, and fynes feoffementes releassez and confirmacions levied made or to be levied and made by them, shalbe of the same effect strengith and force ageyn them and their heirez, to all intentes and purposez, as if they, att the tyme of suche recouveryez or levying suche fynez or makyng suche feoffementes releassez or confirmacions, had had suche estates rightes and interestes in the possession reuersion or remaynder of the same londes tenementes or hereditamentes so beyng in use, as they had in the use.

(5) Item, that uses may be declared and expressed in Fynes, if the parties to the fyne will require it, and that euery fyne feoffement releasse and confirmacion, to be be made levied or had by eny person or persons to eny person or persons after the first day of January next, wherein none use shalbe certenly lymytted and fully expressed, shalbe takyn to the onely use of these persons to whom suche fynes feoffementes releassez or confirmacions shalbe made or had, and that all recoueryez shalbe to the use of the recouerers, eny usage to the contrary heretofore had not withstondyng.

(6) Item, that no bargeyn contract Couenaunt or Aggrement, by them selfes onely, shall make or chaunge the use of eny londes tenementes or hereditamentes from eny person or persons, but that the persons grevid by non performance of suche bargeyns contractes couenauntes or aggrementes, their executores or admynystrators, shall haue their remediez by accions of couenaunt or upon the case or otherwise, as the case shall require to be requisite, and recouer their damages and amendes in euery suche accions and sutes for brekyng and non obseruyng suche bargeynes contracts couenauntes and aggrementes, and none otherwise, eny usage heretofore used to the contrary herof not withstondyng.

(7) Item, that recoueryes, in comen writtes of entre in the post, had by assent of the parties, and fynes and feoffementes hereafter to be had or made, shall bynde the parties to suche recoueryes fynes and feoffementes and their heires and the feoffez to their usez and their heires; And that none other person or persons, whiche shall haue eny reuersion or remaynder of the londes and tenementes herafter to be recouered in suche writtes, or wherof eny fynes or feoffementes, herafter shalbe made or had, shalbe bounden or take eny losse damage or hurt by reason of suche recoueryes fynes or feoffementes, unlesse they be made privy to them by voucher, aide prayer, or otherwise by their assentes determyn or release their interestes rightes and titles in suche reuersions and remaynders, but that the title interest and possession whiche eny person or persons, not beyng parties nor privie to eny suche recoueryez fynes or feoffementes shall haue in eny reuersions or remaynderz att the tyme of such recoueryez fynes or feoffementes had or made, shall still remayn and abide in them and their heires, as if no suche recoueryez fynes or feoffementes had be [*sic*] had or made.

[1] The word "condicions" is written over the word "accions."

(5) THE PROPOSED STATUTE OF ENROLMENTS. LETTERS AND PAPERS. HENRY VIII. Vol. 101, fol. 303. Calendared in L. and P. Hy. VIII. Vol. x. No. 246. (6)

[I have divided this document into numbered paragraphs for convenience of reference. In the original there is no such division. I have inserted the words in square brackets.]

Where as gret stryues debatis and varyaunces dayly are moued amongste the Kinges subiectes for rightes titles interestes and possessions of londes tenementes and hereditamentes, as well by occasyon of forgyng of dedys feoffementes Releases leases confirmacyons Indentures and other evydences and wrytinges concerning the same, as for the tryall of the truthe of suche euydences and wrytinges, and also by occasyon of bargeines contractes and agrementes oftentymes made of londes tenementes and heredytamentes only by wordes without wrytinges, to the grett inquietnes of the kynges subiectes, and to the importable charges and expenses yn the sutes of the lawe by reason of the tryall of suche forged euidences, for remedy wherof be it enacted by auctoryte of this present parlyament in maner and Forme as hereafter ensuethe in Articles, that is to saye :—

(1) First, it ys ordenyd by Auctoryte a fore sayd that the use trust or confydence of suche londes tenementes or heredytamentes, after the last day of July wᶜ shalbe in the yeare of our lorde god MᴸD and xxxvj, shall not pass alter chaunge from on to an other, nor shalbe had or made by or to any person or persons to any use of trust or confidence, by reason of any Recouerys fynes Feoffamentes gyftes grauntes Couuenauntes contractes bargeynes Agrementes or otherwyse, Onless that the use trust or confydence, agreyd and concluded betwene the parties uppon suche recoueryes fynes Feoffamentes gyftes grauntes contractes or bargeines, be declared by wrytinges suffycyently to be made under seale, and delyuered by and to the parties according to the lawes of this Realme, and that the same wrytynges be enrolled in manner and forme under wrytten.

Also it ys ordeynyd by auctoryte aforesaid that all maner of euydences and wrytinges, of what name [*sic*] so euer they be, concernyng londes tenementes or heredytamentes, which shalbe made after the said laste day of July which shalbe in the yere of our lord god a MᴸD xxxvj, shall be knowledged and enrolled in maner and Forme as shalbe hereafter expressed in thys acte.

(2) And, for the due executyon thereof, the Kynges hyghnes hys heires and successors kinges of this Realme shall haue power and auctoryte to constitute or ordeyne and make, by his letters patentes under his great seall, in euery shire and Rydinge of this Realme, one pryncypall officer or mo at his or their pleasures; and that the Chauncelar of Englande for the tyme being shall haue powar and auctoryte, by the Kinges letters patentes, to be made in the Kinges name, to constitute make and assinge one clerke for euery of the seid offycers [which] shalbe called and named Master of Enrolmentes of euydences and wrytinges concernyng any landes Tenementes and hereditamentes, And that euery of the said Clerkes shalbe Called Clarke of the enrolmentes of the said euydences and wrytynges; and that euery of the seid offycers, with one of the seid Clarkes yoined with him, shall ioyntly together haue powar and auctoryte to accept and take the confession of euery person that wyll knowlege to be his dede any euydences or wrytinges, what so euer they be, concernyng any tenementes or heredytamentes lying or beinge within their lymyttes to be conteyned in their letters patentes, and fully to enrolle the same in a Rolle of Recorde remaynyng with them, in such lyke maner and Forme or according to suche effectes as euydences and wrytinges be knowleged and enrollyd in the kinges Chauncery or any other his cortes of Record.

(3) Item, it ys ordeyned by the auctoryte aforesaid that euery of the seyd officers and Clarkes, after ther letters patentes to them graunted and be for and [*sic*] exercyse of their offyces, shall take a corporall othe before the Chauncelar of England for the tyme being, that they shall not Receue the knowledge of any persons beinge naturall foles or not of hole mynde, and that they shall endevour them selues with all due crycumstance to knowlege and serche that the persons knowledgynge and euydences or wrytinges a for them do it of their Fre and good wyttes, and that they shal not wittingly receyue the knowlege of any other then of the parties to such euydences and writynges, and that they shall well and trewly do use and exercyse their offices in euery thinge as shall apparteine, accordinge to the Forme of thys [Act] without fraude desceyte Couen or corruptyon so helpe them god and all saintes.

(4) Item, it ys ordeynyd by auctoryte aforesaide that euery of the seid offycers shall haue a seall delyuerid unto him by the lorde Chauncelor of Englond for the tyme being, which shalbe called the seale of his offyce, wherwith he shall seale with waxe euery of the seid euydences and wrytinges before them knowleged and enrolled, and euery of the seyd Clarkes shall endorse and wrytt uppon the baksyde of suche euydences and wrytynges his owne proper name, and the day and yere of the knowlege of suche euydences and wrytynges, and the treu nombers of the Roll wher in they be enrolled.

(5) Item, it is enactyd by auctoryte a forseyd that euery of the seid princypall offycers to be assigned, as ys aforseid, shall take of the parties knoledginge any euydences or wrytinges afore them, concerninge any landes tenementes or hereditamentes beinge under the clere yerely value of xxs., iiijd. and not aboue, and for euydences and wrytinges to be knowleged and enrolled concerning any landes Tenementes or heredytamentes of the seid Clere yerely value of xxs. or aboue and under the clere yerely value of v markes, euery of the seid pryncypall offycers shall take for the knowlege of the seid parties viiid., and euery Clarke for the enrollinge xijd. and not aboue, and for euydences and wrytinges to be knowledgyd and enrollyd of any londes tenementes and heredytamentes of the cleir yerely value of v markes or aboue, and under the cleir yerely value of x l., euery of the seid offycers shall take xxd., and euery of the clarkes for enrollinge thereof ijs., and for euydences and other wrytinges to be knowledgyd and enrollyd of any londes tenementes and heredytamentes of the cleir yerely value of v markes or aboue, and under the cleir yerely value of x l., euery of the seid offycers shall take xxd., and euery of the clarkes for enrollinge thereof ijs.,[1] and for euydences and other wrytinges to be knowlegyd and enrolled concernyng landes or heredytamentes of the clere yerely value of x l. or aboue to any other yerely value, euery of the seid princypall offycers shal take iijs. iiijd., and euery of the seid Clarkes vs. and not aboue; And that the clere yerely value of the landes and tenementes and heredytamentes shalbe tryen and taken only by the othes of the parties which shalbe knolegyd by suche euydences and wrytynges, without further examynacyon therof.

(6) Item, it is ordeynyd by the auctoryte aforeseyd that euery person and persons at their will and pleasure may knolege and cause to be enrolled all euydences and wrytinges heretofore made concernyng any landes Tenementes or heredytamentes; And that all and singular euydences and wrytinges concerning landes tenementes and heredytamentes, wiche shalbe made after the seid last daye of July which shalbe in the yere of our lorde god a M^L V C xxxvj, and not brought and prefered to any suche of the seid pryncypall Offycers or clarkes which shall haue auctoryte to take the knowlege and enrolmentes therof by auctoryte of this Acte, within the tyme of XL days next after the date of the seid euydences or wrytinges, to be knolegyd sealyd and enrollyd

[1] This repetition occurs in the original.

by vertue of this acte in [*sic*] as ys aboue seide, nor caused to be enrolled in any of the kynges highe Courtes, comenly callyd the Chauncery the kinges benche the Comen place and the kynges Eschequyre, within the tyme of half one yere nexte ensuinge the date of the seide euydences or wrytinges, shalbe voyde and of none effecte, prouyded alweys that yf any person or persons make seale or delyuer any euydences and wrytinges concernynge any landes tenementes or hereditamentes, and afterwarde happen to decesse within the seide XL days next after the date therof, by reason wherof they cannot be enrolled, yet neuer thelesse euery suche euydences and writinges shalbe of the same effecte strenght and vertue as they shuld haue bein yf this acte had neuer byn made, anythinge in this acte mencyoned to the contrary notwithstandinge.

(7) Also it ys enactyd that the princypall offycer or Clarke, to whome any suche euydences or wrytynges shalbe so brought and prefered to be enrolled, shal furthwith indorse with fewe woordes declaringe treuly the daye and yere of his recept therof, as thus, *Receptum per me A.B. Magistrum irrotulamentorum etc.*, or thus, *Clericum irrotulamentorum etc., primo die Maij Anno Regni Regis Henrici Octaui vicesimo septimo;* And when it ys enrolled the Clark shall add therunto, *Et irrotulatum Rotulo xx°.*, or otherwise, as the truthe shalbe.

(8) Also it ys enactyd that no person or persons, whose knowlege shalbe taken of any suche euydences or wrytinges nor any heire of any of them, after suche knowlege taken and inrolment therof made and hadde in forme aboue remembered, shalbe admitted to denye the same evidences and wrytinges, soo knowlegyd and ynrollyd, to be his or their dedes ; Nor to allege that they were not hole of mynde at the makinge and sealinge of them, nor that such euydences or wrytinges were made by mynasses or duresse of imprisonament.

(9) Item, it is ordeynyd by auctoryte aforesaide that, in case any of the seid offycers or Clarkes do falsely and untruly exercyse and use the seyde office in any parte that shall apperteine to the same, or take any more or other fees than is aboue lymytyd by this Acte, And be therof convict by witnes proues or confessyon be fore the lord Chauncelor lorde Tresorar lord presydent of the kinges most honorable Counseill lord pryuy seall or any of them syttyng yn the sterre Chamber of Westminster And Calling to them the too chyff iustices of eyther bynche for the tyme beinge or one of them, that then euery of them, so beinge convicte, shall lose his offyce, and yelde treble damages to the parties greued, And ouer that shall haue imprysoment of his bodye tyll he haue made fyne att the kynges wyll and pleasure.

(10) Item, it ys ordeynyd and enactyd by auctoryte aforesaide that no person shalbe assigned to be any of the seide pryncypall Officers, onles he haue londes and tenementes of Frehold to the clere yerely value of xx l. aboue all yerely charges within the shere where shalbe suche offycer, and that euery of the seide pryncypall offycers shalbe dwellyng and kepe howshold within the lymytes of his auctorite to be conteynyd in hys letters patentes, And that one suche pryncipall officer and one Clarke shall dwelle and abyde in one towne or within the dystaunce or space of thre myles from the one to the other, to the entent that they may be in a Redynes for the case and commodyte of the kinges people that shall Resorte to them for knowledging and Enrollyng of their euydences and wrytings.

(11) And that none of the seide offycers shall take any knowlege of person or persons but yn the presence of the clerke that shalbe lymytyd within hys auctoryte to enrolle the seyde euydences and wrytinges, upon payne that euery of the seide Offycers and Clarkes, offendyng this article, shall lose forfeitt x l., the one Moyte therof to the kynges highnes, and the other moyte of the same to suche as will sue for the same by wrytte bylle pleinte or In-

formacyon in any Courtes of Record, in which sutes no wager of lawe shalbe admytted, nor eny essoine or proteccyon shalbe alowed.

(12) Item, it ys ordenyd and enacted by auctoryte aforeseyd that euery of the seyde Clarkes, that shall haue suche letters patentes by auctoryte of this Acte, shall well and truly enrolle all such euydences and wrytinges as shalbe knowledgyd before him And one of the seide princypall offycers with whome he shalbe ioynyd, within XL days next after the knowleging of suche euydences and wrytinges; And that all the rolles that shalbe made yn one yere, wherin suche euydences and wrytinges shalbe conteynyd, shalbe conioyned by the Clarke, And by the same clarke shalbe delyuered within the tyme of XXX^{ti} dayes, nexte after the ende of the same yere, to the Master of the ynrolmentes, with whome he shalbe adsocyate; and that the seide Master or his suffycyent depute, within other xxx^{ti} days from thens nexte ensuinge, shalbringe the rolles of the seyde yere precedent into the kinges Chauncery, there to remayne and to be kept in lyke maner and forme as other the kynges Recordes of the Chauncery be kept, withoute any Fee or rewarde to any offycer of the Chancery for Receyuyng of the same; And that euery of the seide Clarkes of the Chauncery or Clarkes of the pety bagges, to whome any suche Rolles shalbe preferyd, shall receiue the same Immedyalty and withoute any delay, under payne of forfeture to the Master of the enrollmentes brynging the same Recordes one hundryth shillynges.

(13) And yf the seide officers and clarkes or any of them do make default of the enrolment or in bryngyng and delyueryng the seide Rolles according to this Acte, That then euery suche offycer or Clarke offendyng theirin shall lose their offyces And also shall lose xx^{li} to the kinges highnes, to be levyed of their landes goodes and Catalles to the kynges use by such processe as shalbe deuysed in the kynges Chauncery for the same; prouyded alwey that the seyde Artycle for brynging and delyueryng of the Rolles of any euydences or wrytynges unto the kynges Chauncery shalnot extend to Mayars balyues Stewardes or towne Clarkes of Cytes boroughes or corporat Townes, but that they may kepe their enrolmentes with them as they haue be accustomyd, Any thynge in this article to the contrary not withstandinge.

(14) And it is further enacted by Auctoryte aforeseyde that euery person shal and may haue serche of euery enrolment upon resonable request therof made to suche [as] shall haue the custodye of the Rolles therof, And that no person shall paye for the serche of any enrolment but only as hereafter folowith that is to sey, for euery yere of the enrolment that any person wyll desyre serche of them [he] shal paye vj d. and not aboue; And yf any person wyll desyre to haue copye of the enrolment, That then euery suche person shall paye for wryttyng of euery xvj lynes, to be wrytten in a shete or shetes of papur accustomyd, iiij d. and not aboue; And yf any person or persons deny suche serche, or requyre more for that serche and copyes then is aboue expressyd, That then euery suche Offycer shal lose and forfeitt for euery suche offence v^{li}, the one half therof to oür soueringe lorde the kinge, and the other partie therof to the partye that will sue for the same in any of the kinges Courtes, in wiche sute no wager of lawe shalbe admytted nor any essoyne or proteccyon shalbe allowed.

(15) Prouyded alweis and be it enacted by auctoryte aforesayd that Mayars and Ballyues of cytes boroughes or townes corporat and the Stwardes [sic] or towne Clarkes of such Cytes boroughes or townes corporate, where they haue be accustomed to enrolle euydences and wrytinges concernyng any landes tenementes or heredytamentes, shal haue powar and auctoryte to take knolege of all euydences and wrytinges concernyng any landes tenementes or heredytamentes lying or beinge within the precynctes or lybartyes of any suche Cytes boroughes or townes corporat, and to enrolle the same, in lyke maner and

forme as the seid offycers and Clarkes to be made as ys aforeseide shal and may do by auctoryte of this Acte ; prouydyd alweis that the landes tenementes and heredytamentes of women couert with barne shalnot passe nor to be conveyed from them duryng theyre couerture, but after suche ordre and forme as hathe hertofore be accastomed by the course of the lawes of the Realme, any knowlege or Inrolment to be had or made by auctoryte of this acte in anywyse notwithstandyng.

(16) Prouyded also and be it enacted by auctoryte aforesaid that landes tenementes and heredytamentes maye and shalbe grauntyd by Copie of Courte Rolle as hathe ben accustomyd, and that euery suche graunte Inrollyd in the Courte Rolles of the lorde shalbe good and effectuall accordyng to the tenor of the seid grauntes, Albeit that the Copyes or Rollys therof shalnot be knowledged nor Inrollyd according to this acte afore any of the seide Officers and Clarkes auctorysed by this acte, anythinge in this acte to the contrary notwithstanding.

(17) Prouydyd also that all maner of euydences or wrytinges at any tyme knoledged Afore the lorde Chauncelor only of the great Seale, or be fore the Master of the Rolles, or any masters of the kinges Chauncery, or any of the kinges Justyces of ether benche, or be fore any of the barons of the kinges excheker, and Inrolled of record as it hathe ben accustomyd, shalbe as good and effectuall to all ententes or purposes as they were or shuld haue byn yf thys acte had neuer be made and had, And as yf they had ben knowledgyd and enrollyd be fore suche persons as be auctorysed by this acte, any thinge in this acte to the contrary notwithstanding.

(18) Prouyded alwey that all Inrolmentes, herafter to be made in any towne of this Realme where Inrolmentes haue ben hertofore used of any landes or tenementes lying within the presinct or Jurysdyccyon of the same, shalbe taken and Inrollyd by the offycers of the seide towne as haue ben hertofore used and accustomed, this acte or any thinge therin conteyned to the contrary notwithstanding.

(19) Prouyded also, and be it enacted by auctoryte aforeseyde, that yf any euydences or wrytinges, that shuld be Inrolled by vertue of [this] acte, concerne Maners landes tenementes or heredytamentes lying in sondry Shyres and places, Aut [*sic*] not all only within the lymete of the letters patentes of any of the seid pryncypall officers and the Clarke ioyned with hym, That then yn euery suche Case the parties may haue suche euydences and wrytynges knowleged and Inrolled be fore suche one of the seid pryncypall offycers and the Clarke ioynyd with him as they wyll for their ease and Commodyte chose for the same, any thinge acte [*sic*] yn this acte to the contrary notwithstandyng.

(20) And it ys also ordeynyd and enactyd by auctoryte aforeseyde that euery of the seide pryncypall offycers, with one suche of the seide Clarkes as shalbe assocyate with him, shall haue powar and auctoryte to take the knowlegges of all oblygacyons acquytaunces and other wrytinges consernyng personall thinges, and to enrolle the same, in lyke maner and forme as they may doo wrytynges concernyng landes tenementes or heredytamentes by vertue of this acte.

(21) Prouyded alweis that no person shalbe bownden to enrolle any suche oblygacyons acquytaunces or other wrytinges concernyng personall thinges but at their owne free will and pleasures, and yff suche wrytinges be not knowledgyd and Inrollyd, yet neuerthelesse they shalbe of the same strenght as they shuld haue ben as yf thys acte had [never been] had nor made ; And if suche thinges concernyng personall thinges be knowledgyd and enrolled by auctoryte of this acte, that then euery of them, so being knowledgyd and enrollyd, shalbe of the same strenght and force and effecte as yf they had ben knowledgyd afore any Jugge of Record, and enrolled in any place amonges the kinges Recordes.

INDEX

A

ABATEMENT, 486.
ABDUCTION, 504-505, 514.
ABRIDGEMENTS, of the Statutes, 310-313.
ABSOLUTE PREROGATIVES, 206-207.
ACCOUNT, action of, 421.
ACCURSIUS, 221, 222, 227, 230, 286.
ACCUSERS, two needed in trials for treason, 499.
ACONTIUS, 345.
ACTS OF THE PRIVY COUNCIL, 61-63.
ADMINISTRATION, grants of, 492.
ADMINISTRATIVE LAW, in France, 58, 59; in England, 60, 85-87, 188, 274, 275.
ADMIRALTY, Court of, 84, 238, 272, 273, 284, 292; attack of common law on, 362; criminal jurisdiction of, 523.
ADVERSE POSSESSION, 485-486.
ADVOWSONS, 485.
AFFRAYS, 304.
AFRICAN COMPANY, 339.
AGENCY, 411.
AGRICULTURE, Tudor policy as to, 362-373; inclosures, 364-365; for pasture, 365-368; for tillage, 369; action of the Council, 370; reclamation of wastes, 370-371; supply of labour for, 371; changes in analogous to those in other industries, 371; success of Tudor policy, 371-372; services of new class of landowners, 372-373.
ALCIAT, 225, 239.
ALECONNERS, 158.
ALE-HOUSES, licensing of, 141, 144, 302, 515.
ALIENATION, freedom of, 473-474.
ALIENS, position of, 298, 335-336, 428.
ALL SOULS COLLEGE, 234.
ALPHONSO V., 246.
ALSTON, 211.
AMERCEMENTS, 536-537.
ANDERSON, C. J., 438, 470.
ANNATES, Act of, 97.
ANNE BOLEYN, 493, 494.
ANNE OF CLEVES, 39, 494.
ANTWERP, commercial effects of fall of, 49.
APPAREL, Statutes of, 405-406.
APPEALS OF MURDER, 523.
APPRENTICESHIP, 141, 156, 160, 341-342.
ARCHES, Court of the, 236; dean of the, 235, 236.
ARGENSON, the Marquis d', 110.
ARISTOCRACY, the English, 372-373.
ARISTOTLE, 281.
ARMADA, the Spanish, 46.
ARMSTRONG, 169.
ARMY, proclamations as to the, 299.
ARRETS DE RÉGLEMENT, 220.
ASCHAM, 43.
ASHE, Thomas, 266, 312.
ASHLEY, Sir W., 317, 325, 390.
ASKE, 464.
ASSIZE, judges of, 75-76.
ASSOCIATION OF DOCTORS OF LAW, 235.
ASSUMPSIT, 418, 419.
ASSURANCES, commission for, 68, 69.
ATTAINDER, Acts of, 185.
ATTAINT, writ of, 515, 516, 517.
ATTEMPTS, to commit crimes, 273.
ATTORNEYS, charges of, 538.
AUDLEY, 277.
AUGMENTATIONS, court of, 271.
AUGSBURG, Diet of, 18.
AULNAGER, the, 359.
AUSTIN, 196, 197.
AZO, 220.

B

BACHELOR, of civil law, 229, 232; of decrees, 229, 232.
BACON, Francis, 130, 181, 186, 201, 203, 233, 268, 282, 288, 351, 352, 424, 430, 438, 441, 444, 463, 467; his philosophy, 49-52; his Novum Instrumentum, 51-52.
BACON, Nicolas, 44, 259.
BAIL, 141, 525-528, 529.
BAILMENT, 411, 412-413, 421.
BALDUS, 191, 222, 230.
BALDWIN, 62.
BANKERS, the Italian, 332.
BARGAIN AND SALE OF FREEHOLDS, 424-425, 427; for a term of years, 468; by executors, 483.
BARKER, 309.
BARTOLIST SCHOOL, the, characteristics of the law of, 242-243; system of, 285, 286, 288, 291.

BARTOLUS, 191, 222, 227, 228, 230, 239, 242, 243, 290.
BASTARDY ORDERS, 157.
BAUDOUIN, 226, 227.
BEAUFORT, cardinal, 510.
BEAUMANOIR, 190, 249.
BEGGING, unlicensed, 511.
BELLMAN, 158.
BENEFIT OF CLERGY, 523.
BENEVOLENCES, 26, 104.
BERTHELET, 113, 308, 312.
BIGAMY, 504.
BLACKSTONE, 375, 410, 413, 485, 536.
BODEWELL, Richard, 235.
BODIN, 190, 193-195, 196, 197, 198, 215, 261; his views on witchcraft, 509.
BOLOGNA, 249.
BOLTS, 263-264.
BONNER, bishop, 232.
BOOK OF THE COUNCIL, the, 62.
BOOKBINDING, 335.
BOOKS, see Press.
BOROUGHS, the, character of in Middle Ages, 131; individual development of, 131-132; leet jurisdiction of, 132-133; separate commission of the peace for, 133; rotten, 94, 96.
BORSHOLDERS, 123.
BOURBON, duke of, 108.
BOURGES, 226.
BOWSTAVES, 330.
BOWYER, 310.
BRACTON, 4, 187, 190, 194, 204, 209, 221, 230, 249, 279, 286, 292, 415.
BRAY, 26.
BRIDEWELL, 395, 396.
BRIDGES, 142.
BRIEFS, 306.
BRISSAUD, 223, 227, 246.
BRITTON, 230, 286.
BROOKE'S ABRIDGEMENT, 212.
BUCER, 259.
BUDÉ, 225.
BUILDING ACTS, 303.
BURGERLICHES GESETZBUCH, 292.
BURGHLEY, 44, 47, 48, 72, 329, 332.
BUSINESS OF THE COMMON LAW COURTS, quantity of, 253-256.
BYLAWS, of parishes and older communities, 158; of trading companies, 352.

C

CABINET, the, compared with the Tudor Council, 67, 68.
CABOT, Sebastian, 339.
CALENDAR, reform of the, 306.
CALL TO THE BAR, orders as to, 270.
CALVINISM, 19, 20, 43.
CAMBRIDGE, teaching of Roman law at, 228-229, 232-235; commission to inquire into, 233-234.
CAMDEN, 49.
CANADA, 48.
CANON LAW, 228-232, 272; decline of throughout Europe, 244; influence of on development of equity, 275-276, 278; as to marriage, 490-491.
CANTERBURY, archbishop of, his rules as to admission of advocates, 236.
CAPACITY, natural and politic of the king, 202-204.
CAPITAL, 317, 371, 391, 421.
CARRIAGES, proclamations as to, 307.
CARTA FŒDI, the, 113, 114, 115.
CARY, 259.
CASE LAW, 220, 221, 223, 224-225; in the Chancery, 278; helps to eliminate equitable ideas from the common law, 279.
CATEAU CAMBRESIS, treaty of, 43.
CATHERINE OF ARAGON, 493.
CECIL, 348.
CENTRAL GOVERNMENT, foreign development of in sixteenth century, 56-60; English development of, 60-107.
CEREMONIES, ecclesiastical, 300.
CESTUIQUE USE, 411, 416; capacity to be a, 427-430; legal position of, 430-431; nature of his interest, 432-437; incidents of his interest, 437-443; his liabilities, 431, 442-443; statutory extensions of his powers, 444-446; effect of Statute of Uses on, 461-462.
CHALLENGES OF JURORS, 524.
CHAMBRE, des Comptes, 58; des Enquetés, 170; des Requêtes, 170; de la Tournelle, 170.
CHAMPERTY, 521.
CHANCELLOR, the Lord, see Chancery and Chancery, Court of; the French, 57.
CHANCERY, the, treatment of uses by, 417-443.
CHANCERY, the Court of, 271, 273; influence of civil and canon law on, 275-276; of scholastic philosophy on, 276; develops into a judicial court, 277; influence on of common law ideas, 277-278; the equity of, 278-283; victory of over common law courts, 284.
CHAPUYS, 36, 453.
CHARGE, the, given at Quarter Sessions, 142-145.
CHARITABLE USES, 398; jurisdiction of Chancellor over, 398-399.
CHARITY COMMISSIONERS, 399.
CHARLEMAGNE, 507.
CHARLES I., 329, 340.
CHARLES V., 8.
CHARLES VII., 110.
CHATTELS PERSONAL, uses of, 420-421; influence of trust concept on development of law as to, 476.

CHAUCER, 403.
CHEKE, 43.
CHURCH, the, control of by Council, 81-82; use made by state of its organization, 83.
CHURCH ALES, 152-153.
CHURCH HOUSE, the, 153-154.
CHURCH RATES, 153.
CHURCHWARDENS, 139, 141, 152, 153, 156, 157, 393, 397.
CIVIL LAW, use of to statesmen and lawyers, 244-245; teaching of in Middle Ages, 228-232; in sixteenth century, 232-233; encouragement of at the Universities, 233-234; assistance of foreign teachers, 235; Doctors' Commons, 235-237; place of in England, 237-238, 272; a small reception of in the sixteenth century, 239; analogies and contrasts with continental development, 239; influence of on equity, 275-276, 278.
CLARENDON, 361.
CLASSES OF SOCIETY, the mediæval idea, 304, 402; its decay, 402-403; tendency to fusion, 403-405; public duties of the different, 405; survival of older ideas, 304, 405-406; results of fusion of mediæval and modern ideas, 406-407.
CLERGY, status of the, 489.
CLERICAL DISCIPLINE, 489.
CLERK, to the Council, 62; of the peace, 150.
CLERKS, to the justices of the peace, 148, 150; of the market, 360.
CNUT, 507.
COINAGE, the, reform of, 48; proclamations as to, 297-298; debasement of, 391; offences connected with, 498, 511.
COKE, 130, 149, 173, 184, 186, 202, 205, 225, 253, 257, 272, 280, 288, 296, 349, 350, 351, 356, 357, 358, 362, 366, 378, 396, 432, 499, 518, 519, 537.
COLET, 29, 30, 41.
COLLATERAL WARRANTY, 437.
COLONIES, the, 48; foundation of, 338-340.
COMBINATIONS, to raise prices, 377; to raise wages, 382.
COMMENTATORS, the, see Post-glossators.
COMMERCIAL LAW, growth of doctrines of, 361-362.
COMMISSIONS APPOINTED BY THE COUNCIL, 68-70.
COMMITTEES, of the Council, 67-68; for the state, 68; of the House of Commons, 177-178.
COMMON, rights of, 364.
COMMON DRIVERS, 158.
COMMON FIELD SYSTEM, 364, 371.
COMMON INFORMERS, 356-357.
COMMON LAW, supremacy of in danger in sixteenth century, 284; national character of, 292-293; advantages to from Statute of Uses, 464.
COMMON LAW COURTS, their control of local government, 165; helped by growth of powers of Parliament, 164-165; business of in sixteenth century, 254-256; struggle with rival courts, 284-285.
COMMON PLEAS, state of business in, in sixteenth century, 255.
COMMON RECOVERIES, 482; errors in, 483.
COMMONS, House of, opposition to Henry's proposals as to uses, 453-454, 460, 461; see Parliament.
COMMUNAL COURTS AND OFFICIALS, 122-125; judicial forms under which they acted, 133; constitutional importance of this, 133-134, 151.
COMMUNEROS, revolt of the, 108, 167.
COMPANIES, trading, 48, 302, 355, 360; regulated and joint stock, 319-321.
COMPARATIVE LAW, science of, 289.
COMPOUNDING DEBTS, commissions for, 68, 69.
CONDITIONS, common law, 416.
CONSCIENCE, see Equity.
CONSEIL DU ROI, 56-59, 109, 110, 111.
CONSIDERATION, needed to raise a use, 424, 425, 425-427; doctrine of compared with doctrine of uses and trusts, 407-408.
CONSPIRACIES, to depose or harm the king, 496-497; to levy war, 497; to liberate traitors, 500.
CONSPIRACY, 273.
CONSTABLE AND MARSHALL, court of, 238, 272.
CONSTABLES, control of by council, 79; high and petty, 123-125, 148; juries of, 144; duties of in relation to highways, 156; become parish officials, 158.
CONSTANTINOPLE, 9.
CONTINENTAL LEGAL DEVELOPMENTS, why important in English legal history, 218-219.
CONTINUAL CLAIM, 483.
CONTRABAND, 298.
CONTRACT, the original, 198.
CONVEYANCING, effect of Statute of uses on, 475-476; other statutes relating to, 483.
COOKE, 44.
COPE, 92, 179.
COPERNICUS, 50.
CORN, supply of, 48; price of, 48, 301; magazines of, 301; export of, 371, 374.
CORN BADGERS, 374.
CORONERS, control of by council, 79; office of, 122; examination of suspected persons by, 529.

CORPORATION SOLE, the king as a, 203.
CORPORATIONS, could not be feoffees to uses, 427-428; could be cestuis que use, 427-428.
CORRECTION, see Houses of Correction.
CORRUPTION OF BLOOD, 498.
CORTES, the, 107, 166, 167, 168, 170.
COSTS, 536-538.
COTTON, Sir R., 62, 309, 310.
COUNCIL, the Privy, 60-61; the Acts of the, 61-63; clerk of the, 62; composition of, 64-65; meetings of, 65; personnel, 65-67; committees of, 67-68; commissions and references, 68-70; relation to local government, 71-80, 162-165; relation to church, 81-83; relation to judicial system, 83-88, 284; relation to Parliament, 88-105, 189-190; compared with similar institutions abroad, 105-107, 163-165; criminal jurisdiction of, 273-274; enforcement of laws as to trade, 323-324; upholds monopolies, 347; upholds grants to sue for penalties, 357-358; control of food supply, 374-375; policy of as to inclosures, 370; success of poor law due to, 400-401; see Administrative Law.
COUNCILLORS, ordinary, 64; privy, 64.
COUNCILS OF THE NORTH AND WALES, 66, 73-74, 80, 84.
COUNTER REFORMATION, the, 43-44.
COUNTIES PALATINE, 127.
COUNTY, 160.
COUNTY, business, 148; surveyor, 151; treasurer, 157.
COUR DES AIDES, 58.
COURT BARON, the, 128, 129, 130.
COURT CUSTOMARY, the, 128, 130.
COURTS, political functions of, abroad, 169-172; in England, 188.
COVENANTS, to stand seised, 426-427, 468; running with the reversion, 487.
CRANMER, 39, 40.
CREDITORS, frauds on, 443, 480-482.
CRIMINAL LAW, character of legislation as to, 531-532; action of courts in developing, 532.
CRIMINAL LAW AND PROCEDURE, legislation as to, 492-531.
CRIMINAL PROCEDURE, continental and English development of compared, 528.
CROMPTON, 119, 211, 212; his book on the Justices of the Peace, 116.
CROMWELL, Thomas, 32, 64, 72, 94, 96, 209, 253, 257, 260, 372.
CUJAS, 226, 235, 239, 286.
CUNNINGHAM, 328, 339.
CURTESY, 442.
CUSTOMARY LAW, relation of sovereign to, 196.
CUSTOMS REVENUE, the, control of by crown, 105.
CUSTOS ROTULORUM, the, 149-150.

D

DALE, Valentine, 235.
DALTON, his book on the sheriff, 119.
D'EWES, 175, 178, 180.
DE HOMINE REPLEGIANDO, the writ, 526.
DE TOCQUEVILLE, 56, 274.
DEBT, action of, 421.
DEFORCEMENT, 485.
DENTON, 259.
DEPARTURE FROM SERVICE, 383; procuring a, 383-384.
DEPOPULATION, 366.
DEPTFORD, 327.
DESCENT CAST, effect of, 485.
DETINUE, action of, 413, 421.
DICEY, 11.
DIGBY, 410.
DISCONTINUANCE, of estates, 483, 484, 485; of actions, 534.
DISMISSAL, wrongful, 383.
DISPENSING POWER, of the king, 205; delegation of, 347, 357-359; of the pope, 491.
DISPUTED ELECTIONS, see Elections.
DISSEISIN, 483, 486.
DISTRAINT, 487.
DIVINE RIGHT, theory of king's, 196, 200, 215.
DIVORCE, Henry VIII.'s, 35, 450, 464.
DOCTOR OF CIVIL LAW, degree of, 229, 236.
DOCTOR OF DECREES, degree of, 229.
DOCTOR AND STUDENT, the dialogue of the, 259, 275-276, 316, 468; theory of equity contained in, 279-282.
DOCTORS' COMMONS, 235-237.
DONEAU, 226, 227.
DORNE, John, 41.
DOUAREN, 226.
DOWER, 442, 462, 466.
DRAKE, Sir Francis, 339.
DRUNKENNESS, 514-515.
DUCHY CHAMBER, court of, 271.
DUCK, Arthur, 226, 244, 247, 249.
DUDLEY, 26.
DUELLING, 304.
DUPLESSIS-MORNAY, 189.
DURHAM, Henry's legislation as to, 37, 38.

EAST INDIA COMPANY, the, 320, 339.
EASTLAND COMPANY, the, 320.
ECCLESIASTICAL CAUSES AND PERSONS, control of by council, 82.
ECCLESIASTICAL COURTS, 260; civilians' practice in, 238; treatment of perjury by, 526.
ECCLESIASTICAL LAW, changes in, 488-492.

ECCLESIASTICAL POLITY, the, see Hooker.
ECCLESIASTICAL PROPERTY, 489-490.
EDWARD VI., 40, 43, 96.
EGERTON, 274, 277, 472.
EGYPTIANS, 511.
EJECTMENT, action of, 485, 486.
ELECTIONS TO PARLIAMENT, interference with by council, 95; disputed, 95, 178.
ELIOT, Sir John, 175, 178.
ELIZABETH, 41, 90, 91, 96; accession of, 43; her Scotch policy, 44-45; her foreign policy, 44-47; her ecclesiastical settlement, 47-48; her economic and social policy, 48-49; character of her reign, 49-52; completes Henry VIII.'s work, 52-53; relation to Parliament, 53, 89-99; her action on the monopoly question, 348-349.
ELLESMERE, see Egerton.
ELSYNG, 310.
EMBEZZLEMENT, 501.
EMBRACERY, 520, 521.
EMIGRATION, proclamation as to, 307.
EMMANUEL, 246.
EMPLOYER AND WORKMAN, law of, 379-387.
EMPLOYMENT, contract of, 382-383.
EMPSON, 26.
ENCLOSURES, see Inclosures.
ENGLISH CONSTITUTION, native development of, 4, 5.
ENGLISH LAW, its mediæval development compared with that of continental states, 223-225.
ENROLMENT OF CONVEYANCES, draft bill as to, 457-459; why it failed to pass, 459-460; the statute of, 427, 460, 462, 468; evasion of, 468.
ENTAIL, Henry VIII.'s proposals as to, 450-453; when bar of is prohibited, 482.
ENTRIES, book of, 62.
ENTRY, right of, 483, 484.
EPISTOLÆ OBSCURORUM VIRORUM, 15.
EQUITABLE OWNERSHIP, nature of, 433-437.
EQUITY, place of in the English legal system, 278-281; limits of its interference with law, 281-282; becomes a system, but dependent on law, 282-283.
ERASMUS, 13, 15, 29, 30, 258, 259; his Novum Instrumentum, 30, 41, 52.
ERROR, proceedings in, 536.
ESCHEATS, 437, 446.
ESTATES GENERAL, the, 20, 107, 166, 167, 168, 169, 197.
EXAMINATION OF ACCUSED PERSONS, 273, 528-530.
EXCHEQUER, Court of, increase of business in, 255.
EXECUTION, process of, 534-535.
EXECUTORS, 411, 412, 414, 420, 435, 436, 437; influence of trust concept on law of, 476; de son tort, 492.
EXECUTORY DEVISES, 467.

FAIRBAIRN, 15.
FAMILY LAW, 476-477.
FELLOWS OF COLLEGES, election of, 489.
FELONIES, 500-512; extensions of older, 501-503; new, 503-512.
FEOFFEES TO USES, see Uses, Feoffees to.
FERDINAND, 9, 19.
FERRERS, 308.
FERRER'S CASE, 91.
FEUDAL JURISDICTION, 125-126.
FIGGIS, 197.
FINES, operation on estates tail, 483; errors in, 483.
FINEUX, C.J., 439.
FISHER, bishop, 41, 115.
FISHING, 505, 506.
FITZ-ALWYNE'S ASSIZE, 303.
FITZHERBERT, Anthony, 115; his tracts on husbandry, 114, n 2; his books on the justices of the peace, 115, 116.
FITZHERBERT'S ABRIDGMENT, 212, 262.
FLEMING, C. B., 337.
FLETA, 286.
FLORE ROGER, will of, 422.
FOOD PRICES, 301, 302, 375, 376-377; enforcement of rules as to, 377-378; repeal of this legislation in nineteenth century, 379; see Forestalling.
FOOD SUPPLY, 374-375.
FORCIBLE ENTRY, 487-488.
FOREIGN AFFAIRS, proclamations as to, 298; power of crown over, 336.
FOREIGN TRADE, causes of change in character of, 315-316; organization of, 319-321; promotion of, 332-340; regulation of exports and imports, 333-335; regulation of the tariff, 335-338; foundation of colonies, 338-340.
FORESTALLING, 140, 301, 375; mediæval law of, 375-376; statutory definition of, 375, 376, 377; enforcement of this legislation, 377-378.
FORFEITURE, for treason, 500; for felony, 523.
FORGERY, 273, 501-503; of the king's seals, 498.
FORTESCUE, 26, 27, 62, 64, 88, 174, 210, 214.
FOSTER, 329.
FOUR DOCTORS, the, 220-221.
FOX, bishop, 26.
FRANCE, 8; reformation in, 19.
FRANCIS II., 44.

FRANCISCANS, the, 416.
FRANCO-GALLIA, the, 197, 198.
FRAUD, proof of, 481.
FREEDOM OF TRADE, meaning of in sixteenth century, 350.
FRENCH REVOLUTION, the, 199.
FROBISHER, 339.
FRONDE, wars of the, 59.
FUERO JUZGO, the, 246.
FUGITIVE SERVANTS, 383.
FULLER, 351, 352.
FUNDAMENTAL LAWS, abroad, 169, 172; not recognized in England, 186-187.

G

GAIRDNER, 27.
GALILEO, 50.
GAME, 505-506, 513.
GAOLS, 142.
GARDINER, bishop, 102, 201.
GAWDY, C. J., 383, 384.
GENERAL SESSIONS, see Quarter Sessions.
GENTILI, 235, 239, 290.
GERMAN LAW, effect of the reception, 248; evolution of, 291-292.
GERMANY, divided state of, 8; reformation in, 17-19.
GERSON, John, 230, 276.
GIERKE, 243.
GILBERT, C. B., 410.
GILBERT, Humphrey, 339.
GILDS, charitable works of, 160; used to control trade, 321-322, 355, 360; control of ordinances of, 322-323; control of common law and council, 324-325; regulations as to apprentices, 340-341; as to quality of goods, 342; religious, 389-390, 439.
GLANVIL, 4, 230, 286.
GLOSS, the, 221.
GLOSSATORS, the, 220-222, 286.
GLOUCESTER, statute of, 537.
GODEFROY JACQUES, 226.
GOOCH, 214.
GOOD CONSIDERATION, 425-427.
GOODRICH, 97.
GOVERNORS, Royal, 109.
GRAND CONSEIL, 58.
GRANDE-CHAMBRE, the, 170.
GRAVINA, 227.
GREAT COUNCILS, period of the, 21.
GRESHAM, Sir Th., 333, 403.
GRESHAM COLLEGE, 237.
GROCYN, 29.
GROOT HUGO DE, see GROTIUS.
GROTIUS, 290, 291, 298.
GROUPS, personality of, 408; unincorporated, 439, 444, 477-478; those which were helped by trust concept, 478-479; their characteristics, 479-480.
GUARDIANSHIP, 477.
GUNPOWDER, 299, 330-331.

H

HAKLUYT, 49.
HALE, 337, 499.
HALLAM, 72.
HANNIBAL, Thomas, 235.
HANSE, the, 332-333.
HAPSBURG, house of, 8.
HARINGTON, lord, 298.
HARVEY, 51.
HATTERS, 335.
HAWARDE, 86.
HAYWARDS, 158.
HEAD BOROWS, 123.
HEIDELBURG, 250.
HEINECCIUS, 227.
HENRY VII., 10; problems confronting, 23-25; his character and policy, 25-28; Tudor policy foreshadowed by, 28-29.
HENRY VIII., 10, 91, 92, 94, 102, 104, 283; his character and policy, 30-32; early years of reign, 33-34; policy after Wolsey's fall, 34-36; dissolution of the monasteries, 36-37; continuity the note of his domestic policy, 37-38, 283; pilgrimage of grace and its suppression, 38-39; maintenance of his ecclesiastical settlement, 39-40; his proposals for reform of land law, 450-455; legislation as to uses, 455-457; as to enrolment of conveyances, 457-459; as to wills of land, 465-466; his marriages and the law of treason, 493-494.
HERESY, 506-507, 509; proclamations as to, 300.
HERETICAL BOOKS, proclamations as to, 299.
HERVEY, Dr., 235.
HIGH COMMISSION, court of, 81-82.
HIGH COURT OF PARLIAMENT, 183.
HIGHWAYS, 139, 157.
HINDOO LAW, 271.
HOBBES, 195.
HOBHOUSE, bishop, 152.
HOGWARDENS, 158.
HOLLAND, effects of reception in, 249; trade rivalry with, 329.
HOLMES, Mr. Justice, 410.
HOLT, C. J., 538.
HOLY ROMAN EMPIRE, 191, 241, 290.
HOOKER, 212-214; aim of his ecclesiastical polity, 212; idea of supremacy of the law, 212-214.
HORSES, sale of, 330, 522.
HOSPITALS, 393, 395, 389, 390; foundation of, 398.
HOTMAN, Francis, 189, 197, 198, 199, 226, 235, 259, 291.

HOTMAN, Jean, 235.
HOUSES OF CORRECTION, 139, 144, 157, 396, 398.
HUDSON, 502, 503, 516, 517, 518.
HUE AND CRY, the, 521-522.
HUGHES, W., 313.
HUGUENOTS, the, 46.
HULME, 345, 347, 351.
HUNDRED, 153, 160; liability of, 521-522.
HUNGARY, 3.
HUNTING, 505-506.
HUSÉ, C.J., 432
HUSS, 9.
HUTTEN, Ulrich von, 15, 258.

I

IHERING, 289.
IMPERIAL CHAMBER, the, 251.
IMPOSITIONS, to maintain balance of trade, 337-338; for revenue, 338.
IMPRESSMENT, of sailors, 329-330; of soldiers, 299.
IN FORMA PAUPERIS, suits, 538.
INCIDENTS OF TENURE, effects of on land law, 446; effect of evasion of, 447; why evasion was acquiesced in, 448-449; effects of Statute of Uses on, 462, 464, 465-466, 467; effect of on interpretation of Statute of Uses, 472-473.
INCLOSURES, 302, 364-370, 391.
INDICTMENTS, formal errors in, 531; removal of, 525.
INDUSTRIES, regulation of, 340-343; measures to secure skilled workmen, 340-342; to secure good quality, 342-343; encouragement of new, 343-354; by legislative measures, 343; by monopolies, see Monopoly Patents.
INFANTS, 428.
INFORMATIONS, criminal, 524.
INGROSSING, see Forestalling.
INNS OF COURT, legal education at, 229, 230, 263-264; its effects on study of Roman law, 230-231; its effect on the common law, 270-272; compared with Doctors' Commons, 237; discipline of students, 264-266; finance, 266-267; social and other activities, 267-268; control of, 268-270.
INQUISITION, the Spanish, 19, 508.
INSANITY, in cases of treason, 500.
INTENDANTS, the, 57, 59, 109, 110, 111.
INTERNAL TRADE, organization of, 321-322.
INTERNATIONAL LAW, 22, 199, 214, 238, 290.
INTRUSION, 486.
INVENTIONS, new, justifies a monopoly, 350-351, 353; definition of, 354.
IRNERIUS, 220.
ISABELLA, 9.

J

JACQUES DE REVIGNY, 222.
JAMES I., 215, 233, 272, 284, 329, 340; his belief in witchcraft, 510.
JANE SEYMOUR, 494.
JEOFAIL, statutes of, 535.
JESUITS, 47, 495, 496.
JEWEL, bishop, 510.
JOAN OF ARC, 510.
JOINT TENANTS, 483.
JUDICIAL MACHINERY, legislation as to, 538-539.
JUDICIAL POWERS, separation from legislative powers, 184-186.
JUDICIAL SYSTEM, control of by council, 82-88.
JURIES, the presenting at Quarter Sessions, 143.
JURIS FIRMA, 170.
JUS, civile, 287; divinum, 289; gentium, 289.
JUSTICES OF THE PEACE, fifteenth century—powers, 134; use judicial procedure of older courts, 135-136; effects on local government and common law, 136-137; sixteenth century—powers: the single justice, 138-140; two or more justices, 140-142; the quarter sessions, 142-145; organization: differentiation of the sessions, 146-149; beginnings of a clerical staff, 149-151; charge of at quarter sessions, 142-145; control of by council, 78-79; disputes of settled by council, 80; effect on of growth of powers of Parliament, 180-181; procedural advantages given to, 524; duties of as to bail, 527-528.

K

KEMPE, John, 344.
KING, the, new position of in sixteenth century, 190-192; *abroad*—becomes absolute, 192; hence theory of sovereignty, 193-196; effect of on theory of state and conception of law, 196; opposition to new theory, 197-199; *in England*—head but not sovereign of the state, 200; limited by Parliament, 201; and the law, 201-202; development of conception of Prerogative, natural and politic capacity, 201-204; inseparable prerogatives, 204-206; distinction between ordinary and absolute powers, 206-207; contrast between sixteenth and seventeenth century use of these ideas, 207-208; Hooker's theories as to position of, 213-214; divine right of, 215; cannot be feoffee to uses, 427; de facto and de jure, 500.

KITCHIN, John, his book on the court leet and baron, 120-121; 130-131.
KNIVET, 376.

L

LABOURERS, statutes of, 141, 379-380; principles underlying and their modification, 380-383, 390, 393, 394.
LAMBARD, 84, 130, 137, 138, 139, 140, 143, 144, 145, 146, 211; career of, 117; his Archainomia, 117; his Archeion, 117, 118; his Eirenarcha, 117, 118-119; his tracts on constables, etc., 117, 118, 119, 120.
LAND LAW, statutes relating to, 480-488.
LANDLORD AND TENANT, 487.
LANDOWNERS, statute of uses increases their powers, 473-476; their services to the state, 372-373.
LARCENY BY A BAILEE, 501.
LATIMER, lord, 420.
LAW, new definition as result of theory of sovereignty, 195-196; supremacy of the, 111, 169, 188-189, 200, 201, 202, 275, 284, 290-291; Hooker's theory of, 212-214.
LAW OF GOD, 279, 280, 281.
LAW MERCHANT, 238, 240.
LAW OF NATURE OR REASON, 279, 280, 281, 289, 290.
LAW, John, 110.
LEAGUE OF NATIONS, 168.
LEASES, by ecclesiastical persons and colleges, 490.
LEATHER, trade in, 335.
LEE, Dr. Robert, 273.
LEET, the, 152, 153, 158; jurisdiction of, 127-131; in boroughs, 132-133.
LEGAL EDUCATION, in the Inns of Court, 263-264; compared with the universities, 270.
LEGISLATION, effect of development of procedure of, 184-185.
LEICESTER, the earl of, 53.
LEONARD, Miss, 395, 399, 400.
LEPANTO, battle of, 9.
LETTOU, 311.
LEVANT COMPANY, the, 320.
LEX ET CONSUETUDO PARLIAMENTI, 176.
LIBEL, 273.
LICENSING OF ALE-HOUSES, 515.
LIMITATION, period of for indictments for certain kinds of treason, 499; for certain other indictments, 525; for personal actions, 533; for real actions, 484-486.
LINACRE, 29.
LIT DE JUSTICE, 171.
LITTLETON, 230, 483.
LIVERIES, gifts of, 520.
LOANS TO THE CROWN, 104.
LOCAL GOVERNMENT: *Abroad*—development of, 108-111; growth of official bureaucracy, 109-110; supported by standing army, 110; dependance of on the Conseil du Roi, 110-111; *In England*—compared with foreign development, 112; literature of, the mediæval tracts, 112-115; books on justices of the peace and older officials, 115-116; books on justices of the peace, 117-119; books on other officials, 119-120; books on court baron and court leet, 120-121; mediæval period, communal courts and officials, 122-125; the feudal element, 125-127; the franchises, 127-134; later mediæval period, 134-137; the sixteenth century, new powers of justices of the peace, 137-145; new organization of justices of the peace, 145-151; the parish, 151-152; a unit of ecclesiastical government, 152-155; a unit of secular government, 155-160; why adapted to secular uses, 160-163; characteristics of English local government, 163-165.
LOCAL GOVERNMENT CONTROL OF, by the council, 71-80, 162-163; contrasted with mediæval and continental forms of control, 71-72; by the provincial councils, 73-74; by the judges of assize, 75-76; by the lords-lieutenant, 76-77; how the council acted, 77-79; support given by the council, 79; settlement of disputes, 79-80; control of the common law courts, 165; conflict between common law and administrative law of the council foreshadowed, 165-166.
LONDON, 303, 304, 361; court of requests of, 539.
LONG PARLIAMENT, the, 293, 329, 360.
LORDS, House of, 92, 93.
LORDS-LIEUTENANT, 76-77.
LOTTERIES, 306-307.
LYGHAM, Dr. Peter, 257, 258.

M

MACHIAVELLI, 12, 21, 110, 170, 194.
MACHLINIA, 308, 311.
MAGICIANS, 507.
MAINPRIZE, 526.
MAINTENANCE, 431, 444, 520, 521.
MAITLAND, 253, 256, 262, 282, 415, 448, 461, 491, 508.
MAJORITY PRINCIPLE, the, 168.
MALICE PREPENSE, 501.
MALYNES, 298.
MANIFESTATION, 170.
MANOR, 153, 160.
MANORIAL COURTS, 158; jurisdiction of, 126.
MANSFIELD, lord, 292, 447.
MANWOOD, John, 127.

MARKET OVERT, 522-523.
MARLBOROUGH, statute of, 448, 537.
MARLOWE, 49.
MARRIAGE, of priests, 489; prohibited degrees of, 491-492.
MARRIED WOMEN, 428; interest in land held to their use, 428-429; separate property of, 477.
MARY, 49, 43, 91.
MARY QUEEN OF SCOTS, 44, 46, 47.
MASTERS OF REQUESTS, English, 64; French, 57, 109.
MAYORS, control of by council, 78-79; disputes between, 79-80.
MENDOZA, the case of, 235.
MERCANTILE SYSTEM, the, 316, 366.
MERCHANT ADVENTURERS, the, 320, 333, 381.
MERCHANTS OF ANDALUSIA, company of, 320.
MIDDLE AGES, legal and political ideas of, 21, 22, 240, 290.
MIDDLE CLASSES, rise of the, 403-404.
MISDEMEANOUR, growth of conception of, 512-513; classes of, 514-521.
MODERN STATE, rise of in England and abroad, 54-55.
MOHACZ, battle of, 3, 9.
MONASTERIES, charitable works of, 160.
MONASTERIES, dissolution of, 36-37; effect on learning, 42; effect on land ownership, 372; effect on pauperism, 391; helps to cause pilgrimage of grace, 464-465; other effects, 487, 489, 490.
MONKS, status of, 489.
MONOPOLY PATENT, 344-354; mediæval grants, 344; new system introduced from Italy, 345-346; abuse of system by crown, 302, 346-348; Parliamentary agitation against, 90, 348-349; common law rules as to, 349-353; James I.'s statute, 353-354; origins of modern patent law, 353-354; jurisdiction over patents, 354.
MOORE, 349.
MOOTS, 234, 263-264.
MORE, Sir Th., 12, 17, 29, 33, 41, 64, 115, 258, 277, 439.
MORTMAIN, evasion of statutes of, 444.
MORTON, cardinal, 26, 64.
MOUNTJOY, lord, 29, 30.
MURDER, 501.
MYDDLTON, 308.

N

NAPIER, 50.
NATIONAL DEFENCE, trade regulations to safeguard, 327-331.
NATIONAL LAWS, 291-292.
NAVIGATION ACTS, 328, 329, 340.
NAVY, 48; proclamations as to the, 299; statutes as to the, 327-333.
NEATHERD, 158.
NETHERLANDS, religious wars in, 48-49.
NEUTRALITY, 298.
NEWFOUNDLAND, 339.
NISI PRIUS CASES, trial of at Westminster, 539.
NON OBSTANTE, 205.
NORMAN CONQUEST, the, 242.
NORTH, Roger, 113.
NORTH, Sir Th., 49.
NORTH, council of the, 66, 73-74, 80, 84.
NORTHERN EARLS, rebellion of the, 47.
NORTHUMBERLAND, duke of, 40.
NORWICH, 343, 395.
NOVA STATUTA, 308.
NOY, 349.
NULLUM TEMPUS, etc., rule abolished in certain cases, 525.
NYS, 243.

O

OFFICES, sale of, 520.
OFFICIALS, offences of, 520.
OPUS, the, 415, 416.
ORDERS, to Inns of Court by judges and council, 269-270.
ORDNANCE, 330, 331.
OUTLAWRY, 534.
OVERSEERS OF POOR, 141, 157, 397.
OWNERSHIP, relativity of at common law, 434; divided, 435.
OXFORD, teaching of law at, 228-229, 232-235; commission to enquire into, 233-234.

P

PARISH, the, definition of, 151; theories as to its place in local government, 151-152; a unit of ecclesiastical government, 152-155; a unit of secular government, 155-160; this is the effect of Tudor statutes, 155-156; the parish and the poor law, 156-157, 392, 393; becomes a rating unit with an executive staff, 157; other activities of, 157-158; takes place of older communities, 158; variations in size and government of, 158-159; open and close vestries, 159-160; why it became a unit of local government, 160-163; compared with older communities, 160; better suited to administrative work than the justices, 161; relation to the justices, 162, 164; see Poor Law.
PARISHES, ownership of land by, 439-440.

PARLEMENTS, 58, 59, 197; the Provincial, 107, 171-172; of Paris, 20, 107, 170-172.
PARLIAMENT, in Tudor period, Wolsey's dislike of, 33; Henry VIII.'s management of, 35-36; the Reformation Parliament, 36; rise of Puritan opposition, 48-49; Elizabeth's management of, 53; control of by council, 88-105; place of in constitution, 88-89; growing importance of, 89-90; how far discussion was free, 90-92; skilful control of by crown, 92-93; crown's influence on composition of, 93-96; on business of, 96-99; position of speaker, 97-98; privy councillors in, 98-99; its legislative powers, 99-104; its powers over taxation, 104-105.
PARLIAMENT, constitution of, mediæval growth of, 173-174; effect of alliance with lawyers, 174, 184-185; effect of use made of Parliament by Tudors, 174; *Procedure*, 174-178: rules of debate, 175-176; the speaker, 176-177; forms of legislation, 177; committees, 177-178; *Privilege*, 178-180: causes and effects of its development, 180-182; in what sense a court, 182-184; growth of distinction between legislative and judicial acts, 184-186; no fundamental laws, 186-187; legislative supremacy of, 186-187, 283-284; effects of this on the common law, 187-188; strengthens common law control over officials, 188; so preserves mediæval idea of supremacy of law, 188-189; leads to rival political theories, 189-190; these problems shelved in Tudor period, 190; effect on position of king, 200-201; Smith's treatment of, 211.
PARTITION, writ of, 483.
PASQUIER, 250, 251, 252, 291.
PASTURE FARMS, legislation as to, 365-368.
PATENTS, see Monopoly Patents.
PAUPER, status of the, 400, 404-405.
PAYS, des Coutumes, 225, 241, 249, 250; du droit ecrit, 246.
PENAL STATUTES, 347.
PENALTIES, patents to sue for, 355, 357-359.
PERCY, Henry, will of, 420.
PERJURY, 273, 515-519.
PERPETUITIES, creation of by way of use, 441; rule against, 474.
PERSON, offences against, 514.
PETTY SESSIONS, 147.
PEWTERERS, 335.
PHILIP II., 19, 45, 46, 246, 249.
PICKPOCKETS, 574.
PILGRIMAGE OF GRACE, the, 38-39, 89, 94, 245; effect of statute of uses on, 464-465.
PIRACY, 330.
PITHOU, 235.
PIUS V., 495.
PLANTATIONS, trade with the, 329.
PLAYS, 306.
PLEA ROLLS, number of, Henry IV.-Elizabeth, 254-255.
PLEADERS, 306.
PLEADING, 535-536.
PLOWDEN, 130, 279.
POLAND, 3.
POLE, cardinal, 17.
POLITICAL DISCUSSION, effect of reception on, 290.
POLITICAL LENT, 300, 328.
POLITICAL THEORIES OF THE MIDDLE AGES, 290.
POLITIQUES, the, 20.
POOR LAW, need for, 387-388; mediæval expedients, 388-390; their failure, 390-392; principles underlying, 392; relief of poor, 155-157, 160-161, 393-394; pauper children, 394; able-bodied vagrants, 394-395; provision of work, 395-396; the Elizabethan statutes, 49, 156-157, 396-399; the logical outcome of the industrial code, 399-400; why it succeeded, 400-401; effects of, 401-402; offences against, 513; see Parish.
POSSESSIO FRATRIS, doctrine of, 437.
POST, the, 304-305.
POST-GLOSSATORS, the, 222-225, 286; compared with mediæval development of English law, 223-225.
POSTMASTER GENERAL, the, 305.
POWELL, 308.
POWERS OF APPOINTMENT, 474-475.
POYNING'S LAW, 28.
PRÆMUNIRE, statute of, 35.
PRÆROGATIVA REGIS, the, 203.
PREROGATIVE, development of the, 203-208; inseparable prerogatives, 204-206; absolute prerogatives, 206-207; seventeenth century deductions, 206-207; views of sixteenth century lawyers, 207-208; prerogatives over foreign trade, 335-338.
PRAGUE, 250.
PRAISE OF FOLLY, the, 15.
PRAYER BOOK, proclamations as to the, 301.
PRECIOUS METALS, legislation as to the, 331-332.
PRELIMINARY EXAMINATION OF ACCUSED PERSONS, 528-530.
PRESS, the, proclamations as to, 305-306.
PRICES, idea of just, 375, 376, 377, 378; fixing of, 386.
PRINCE, the, Machiavelli's, 12.

PRINCE OF PURPOLE, 268.
PRINTING, see Press.
PRISONERS, relief of, 157.
PRIVATE ACTS, 185.
PRIVATEERS, 298.
PRIVILEGE OF PARLIAMENT, 178-180.
PRIVY COUNCILLORS, position of in House of Commons, 98-99; see Council, the Privy.
PROCEDURE, civil, 532-539; criminal, 498-500, 523-532; offences connected with, 520-521.
PROCESS, 534-535.
PROCLAMATIONS, how they differed from statutes, 99-100; prerogative to issue jealously guarded, 100; extended use after Henry VIII.'s reign, 100-101; why their sphere was ill-defined, 101-102; object of the statute of proclamations, 102-103; its effects, 296; the case of, 296-297; sphere ill-defined at close of sixteenth century, 104; contents of: as to administration of the government, 297-299; as to religion, 299-301; as to commerce and industry, 301-303; as to social life, 303-305; as to the press, 305-306; miscellaneous, 306-307.
PROPERTY, damage to, 503-504; offences against, 514.
PROPHECIES, false, 511.
PROPHET, John, 62.
PROTHERO, 66.
PROVINCIAL COUNCILS, the, 164, 274.
PULTON, 309; his edition of the statutes, 309-310; of the penal statutes, 312, 313; his abridgment, 313.
PURCHASE, for value without notice, 432.
PURCHASERS, frauds on, 443; 480-482.
PURITANS, the, 47, 48.
PYNSON, 308, 311.

QUAESTIONES, the, 69.
QUARTER SESSIONS, 134, 135, 142-145; procedure at, 142-143; judicial form of, 144; the charge at, 143-144; App. I [2]; independent action of, 144; appellate jurisdiction of, 144.

R

RABELAIS, 260.
RALEIGH, 339.
RANKE, 19.
RASTELL, John, 253, 255, 256, 311; William, 311; his abridgment, 311-312.
RATES, 139, 141, 144; poor rate, 157, 393; highway rate, 157; for destruction of vermin, 157; for relief of prisoners, 157; for disabled soldiers and sailors, 158; refusal to pay, 86.
READINGS, 230, 263-264.
REAL ACTIONS, 414; limitation of, 484-486.
RECEPTION OF ROMAN LAW, reasons for, 217; differences in character of, 217-218; why important in English legal history, 318-319; *continental and English development of law in Middle Ages compared*, 220-228; the glossators, 220-222; the post-glossators, 222-225; Renaissance jurists, 225-228; *development of Roman Law in England*, 228-239; the Reformation and the canon law, 228, 232; mediæval teaching of civil and canon law, 229-232; decadence of in sixteenth century, 232-233; university commissions to remedy this, 232-234; revival of, 234-235; Doctors' Commons, 235-237; place of Roman law in English system, 237-239; *Continental Reception*: causes, 240-246; why favoured or disliked, 245-246; content of, 246-250; how effected, 250-252; *Influence of Reception on English Law*: sixteenth century a critical time for the common law, 253; state of business in courts, 253-259; defects in law and procedure, 259-262; cessation of the Y.BB., 262; flourishing state of legal education at Inns of Court, 262-263 (see Inns of Court); effects of this on common law, 270-272; rival bodies of law arising, 272-283; courts administering the civil law, 272-273; council and Star Chamber, 273-275; the court of Chancery, 275-276; close connection of equity and common law, 276-278; conscience and equity, 278-282; dependence of on law, 282-283; existence of common law in no danger, 283-284; supremacy in danger, 284-285; peculiarities of English reception, 285-287; effect on form of English law, 287-288; similarities to continental development, 288-289; *Consequences of Reception in England and abroad*, 289-93.
RECOGNIZANCES, 525, 526.
RECUSANTS, 82; fraudulent conveyances by, 482.
REFEREES, 539.
REFORMATION, the, 4, 9, 11-54; difficulty of, 13; why inevitable, 14-17; how it might have been suppressed, 17; protected in Germany, 17-19; ultimately helps growth of state, 19; but not immediately, 19-20; general effects of, 20-22, 54; bearings on of the divorce question, 35; Henry's ideas as to, 36-37, 38-40; under Edward VI. and Mary, 40-41; Elizabeth's policy, 44-45, 47-48; effect on position of the king, 215; on law of

treason, 494-496; on belief in witchcraft, 509-510.
REFORMATION, the Scotch, 44-45; political ideas inspired by, 215.
REGIUS PROFESSORSHIPS, foundation of, 42.
REGRATING, see Forestalling.
RELIGIOUS DISSENT, political effects of, 198.
REMAINDERMEN, frauds on, 482.
REMAINDERS, 440, 474.
RENAISSANCE, the, 4, 7, 11-54; new ideas of, 11-13; break with the old theological ideas, 13; in Latin and Teutonic countries, 15; effects of Reformation on, 14, 21; progress in England, 29-30 41-43, 49-52; effects of in England and abroad, 54.
RENAISSANCE, legal, of twelfth and thirteenth centuries, 4, 7, 240-242.
RENAISSANCE JURISTS, the, 225-228, 239, 286, 288.
RENT, recovery of, 487.
REPLEVIN, 487.
REPRESENTATIVE ASSEMBLIES, in continental states, 166-169, 172.
REPRISALS, 298.
REQUESTS, court of, 84, 273, 277, 284; masters of, see Masters of Requests.
RESTITUTION, writ of, 522, 523.
RETURNA BREVIUM, 113, 114, 115.
REVELS, at the Inns of Court, 267-268.
REVERSIONERS, frauds on, 482.
RICARDO, the school of, 379.
RICH, 277.
RIDLEY, 233.
RIOTS, 140, 497, 503, 513, 520.
RIVERS, conservation of, 139.
ROGUES, 141, 157, 397, 398.
ROMAN LAW, influence of on uses, 410; ownership in compared with English law, 434; see Reception of Roman Law.
ROMAN-DUTCH LAW, 225, 291.
RUSSIA COMPANY, 320, 339.

S

SAILORS, relief of, 158, 399.
ST. JOHN'S COLLEGE, Oxford, 43.
SALMAN, the, 410, 411, 412, 417.
SALTPETRE, 331; monopoly of lawful, 352.
SANCTUARY, 523.
SANDERS, 410.
SAUNDERS, C. J., 470.
SCACCIA, 333.
SCAVENGERS, 158.
SCOTCH LAW, 247, 248.
SECRETARIES OF STATE, in France, 57; office of in England, 66-67.
SEISIN, development of law as to, 483-484.
SELDEN, 298.
SERJEANTS-AT-LAW, compared with doctors of civil and canon law, 230; their inns, 229; compared with Doctors' Commons, 237.
SERVICE, procuring departure from, 383-384.
SESSION, court of, 251.
SESSIONS OF JUSTICES OF THE PEACE, differentiation of, 146-149.
SETTLEMENT, law of, 156.
SETTLEMENTS, strict, 475.
SEWERS, 142.
SHAKESPEARE, 49.
SHEPHERD, his court keeper's guide, 121.
SHERIFF, the, 122; control of by the council, 79.
SHIP-MONEY, 105.
SHIPPING, 48; encouragement of, 327-331.
SIDNEY, 49.
SIETE PARTIDAS, 246.
SIMONY, 489.
SIX ARTICLES, Act of the, 39.
SIXTUS IV., 9.
SKEEL, Miss, 74.
SKENE, Sir John, 248.
SLANDER OF THE KING, 511-512.
SMITH, Sir Thomas, 43, 44, 64, 70, 97, 174, 175, 177, 181, 182, 201, 208, 209-210, 232, 235, 239, 270, 271, 403; his republic, 210-212.
SOCIETY, classes of, see Classes of Society.
SODOMY, 504.
SOLDIERS, relief of, 158, 399.
SOLICITORS, charges of, 538.
SOMERSET, the protector, 40, 102, 201, 233.
SORCERY, see Witchcraft.
SOVEREIGNTY, theory of, 172-173; not yet grasped in England in the sixteenth century, 190, 208-209, 214-215; Bodin's theory of, 193-195; political and legal effects of, 195-196; how reconciled with political facts, 196-197; opposition to, 197-199; why opposition failed, 199.
SPAIN, 8, 9; reformation in, 19.
SPEAKER, the, 97-98, 175, 176-177.
SPECIAL SESSIONS, 148.
SPENCE, 410.
SPENSER, 49.
STABBING, 501.
STANDISH, Dr., 35.
STAPLE TOWNS, the, 319.
STAR CHAMBER, the, 60-61, 63, 84, 87, 95, 102, 128, 265, 271, 273, 284, 292, 306; new law of the, 34; spheres of its jurisdiction, 273-275; action in relation to commercial regulations, 360-361; in relation to monopolies, 347; in relation to inclosures, 370; in relation to employers and workmen, 381; the Act of 1487, 458; development of

law as to forgery, 502-503; as to perjury, 506-507, 518-519.
STARKEY, 259, 261.
STATE, the, new position of in sixteenth century—*abroad*, 192; based on new theory of sovereignty, 193-196; see Sovereignty; opposition to theory, 197-198; based on mediæval ideas, 198-199; why it failed, 199; *in England*, 200; Smith's book, 210-212; Hooker's book, 212-214; absence of definite theory, 214-215; influence of continental theories slight, 215-216.
STATE, reasons of, 86.
STATHAM'S ABRIDGMENT, 262.
STATUTES, how they differed from proclamations, 99; at large, editions of, 308-310; abridgments of, 310-313; *as to Commerce and Industry*, 314-407; character of, 314-326; trade, 326-362; agriculture, food supply and prices, 362-379; employer and workman, 379-387; unemployment and pauperism, 387-402; classes of society, 402-407; *Uses and Trusts*, 407-480; see Uses and Trusts; *the Land Law*, 480-488; frauds on creditors, etc., 480-482; conveyancing, 483; seisin, 483-484; limitation of actions, 484-486; the termor, 486-487; landlord and tenant, 487; forcible entry, 487-488; *Ecclesiastical Law*, 488-492; *Criminal Law and Procedure*, 492-532; treason, 492-500; felony, 500-512; misdemeanour, 512-521; other topics, 521-532; *Civil Procedure*, 532-539; characteristics of statutes of the period, 539-540.
STAUNFORD, 203, 204.
STEPHEN, 492, 496, 501, 519.
STOREY, John, 232.
STOWE, 253, 255, 389.
STRAFFORD'S IMPEACHMENT, 499.
STRICKLAND, 92, 99.
STUART KINGS, aims of the, 5.
STUDENTS OF THE COMMON LAW, petition of, 253, 257.
SUPREMACY OF THE LAW, see Law, Supremacy of; the royal, 300.
SUPREME COURT OF JUDICATURE, 287.
SURVEYORS, of certain trades, 359; of highways, 156; court of, 271.
SWEARING, 514.

TAILLE, the, 168.
TANNER, 88.
TARIFF, adjustments of the, 298.
TAXATION, control of council over, 104-105; control of Parliament over, 104-105, 174, 180.
TENTHS AND FIRST FRUITS, court of, 271.
TERMOR, the, his remedies, 413-414, 486-487.
TIERS ETAT, the, 168.
TILLAGE, inclosure for, 369-370.
TITHES, 389, 490.
TITHING, the, 152, 158.
TITHING MAN, 123.
TOBACCO, growth of, 302, 340.
TOLERATION, growth of, 20, 21.
TORT, absence of legislation as to, 532.
TORTURE, 273.
TOULMIN-SMITH, 152.
TOWNSHIP, 152, 158, 160.
TRADE, mediæval and modern theories as to, 316, 317, 318, 319, 321, 322, 324-326; regulation of, 326-362; to maintain national defence, 327-331; to maintain stock of precious metals, 331-332; to promote foreign trade, 332-340; to encourage industry, 341-354; enforcement of trade policy, 355-360; effects of this regulation, 361-362.
TRAITORS, fraudulent conveyances by, 482.
TRAVERSE OF OFFICE, 539.
TREASON, 492-500; statutes of temporary importance, 493-496; statutes of permanent importance, 496-498; constructive treason, 498; non-political treasons, 498; new rules as to trials for, 498-499, 523-524; effect of insanity, 500; forfeiture for, 500; conspiracy to liberate persons charged with, 500; service to king *de facto*, 500; anonymous accusations of, 511.
TREATIES, 336-337.
TRESPASS, 512-513.
TREWHAND, see Salman.
TRIALS FOR TREASON, 498-499, 523-524.
TRIBUNAL DES CONFLITS, council tends to become, 87.
TRINITY COLLEGE, Oxford, 43.
TRINITY HALL, 234, 235.
TRINITY HOUSE, 327.
TROVER, 413.
TRUST, the equitable, 476-480; influence on law of chattels personal, 476; on law of executors, 476; on family law, 476-477; on public law, 477-480; compared with the doctrine of consideration, 407-408; see Uses and Trusts.
TUNSTALL, 235, 273.
TURKS, the, 9.
TYCHO BRAKE, 50.

U

UNEMPLOYMENT, problem of, 387-388; see Poor Law.
UNIVERSITIES, courts of the, 238, 272.

USE UPON A USE, the, 468-473.
USES AND TRUSTS, 407-480; position of in English law, 407-408; *mediæval period*, 409-499; origin of, 410-417; development of by chancery, 417-443; control by legislature, 443-449; *the Statute of Uses*, 97, 449-473; its political causes, 450-461; its preamble, 460-461; provisions and effects of, 461-467; how far it succeeded, 467-473; *the use and the equitable Trust*, 473-480; see Trust.
USES, active and passive, 463; creation of, 421-427; ill effects of, 455-456, 460; resulting. 423-424; springing and shifting, 440, 474.
USES, feoffees to, 411, 420, 432, 435, 436, 437, 438; why numerous, 421-422; capacity to be, 427-430; only holders of an estate in fee simple could be, 429-430, 469, 470, 471; position of at law and in equity, 430-431, 445; effect of Statute of Uses on, 461-462.
USES, statute of, see Uses and Trusts.
USUS MODERNUS PANDECTARUM, 292.
UTOPIA, the, 12, 33.

VAGABONDS, 155, 157, 303; definition of, 394.
VAGRANTS, 155, 388, 390, 391, 392. 394-395, 513.
VENUE, 530-531.
VERMIN, destruction of, 155, 157.
VESTRY, the open, 159; close, 159-160, 162; see Parish.
VETERA STATUTA, the, 308.
VIENNA, relief of, 9; foundation of a university at, 250.
VILLEINS, 402, 405, 428, 449.
VINCI, LEONARDO DA, 50.
VINDICIAE CONTRA TYRANNOS, 198, 199.
VINOGRADOFF, 247, 253.
VIRGINIA, 329, 339.
VIVES, 235.
VOLUNTARY CONVEYANCES, 424, 481-482.

W

WAGES, of members of Parliament, 93-94; of workmen—rates, 144, 147, 303, 381-382; mode of fixing, 382-383; wisdom of this policy, 385-386.
WALES, Henry VIII.'s policy as to, 37, 38, 283; council of, 66, 73-74, 80, 84.
WALSINGHAM, 47, 64.
WARDS, the court of, 271, 466, 469, 470, 472.
WARDSHIP AND MARRIAGE, 442-443, 446, 447, 465-466.
WARS OF RELIGION [FRENCH], political literature inspired by, 216.
WEIGHTS AND MEASURES, 302.
WENTWORTH, Paul, 92; Peter, 92, 99, 179, 180.
WILLIAMS, Thomas, 260.
WILLS, of land, 420, 422-423, 438-439; statutes of, 294, 465-466.
WILSON, Thomas, 272.
WINGATE, E., 313.
WITCHCRAFT, 507-511.
WITNESSES, two needed in treason trials, 499.
WITTENBERG, 250.
WOLSEY, 17, 32, 33, 34, 64, 115, 253, 257, 258; his colleges, 33, 41; his commission on inclosures, 366-367.
WOOL TRADE, the, 334.
WOOLF, 243.
WORK, provision of, 392, 395-396, 397.
WORKMAN AND EMPLOYER, law of, 379-387.
WRIOTHESLEY, 257.
WYCLIFFE, 9, 292.

YEAR BOOKS, the, development of English law in, 223-225; cessation of, 253, 262; printed editions of, 262; chancery cases in, 277.

Z

ZASIUS, 225.
ZOUCHE, Richard, 290.

PRINTED IN GREAT BRITAIN AT THE UNIVERSITY PRESS, ABERDEEN

Books on Law

AN OUTLINE OF ENGLISH LOCAL GOVERNMENT

BY

EDWARD JENKS, M.A., B.C.L.

Fifth Edition *Crown 8vo* *5s. net*

This sketch is intended to give the Englishman some reasonable idea of the mass of governmental machinery which he is presumed to manage. Chapters deal with Parish Government, School Districts, Hundreds, Petty Sessional Divisions, County Courts, Poor Law Unions, Counties and Administrative Counties, the Standing Joint-Committee, Boroughs, etc.

GOVERNMENT AND PEOPLE

AN INTRODUCTION TO THE STUDY OF CITIZENSHIP

BY

CONRAD GILL, M.A.

AND

C. W. VALENTINE, M.A., D.PHIL.

Crown 8vo *7s. 6d. net*

A very complete description of Local and Imperial Government for the upper classes of schools, W.E.A., and other adult classes, etc.

METHUEN & CO. LTD., 36 ESSEX STREET, LONDON, W.C. 2

Books on Law

COMMERCIAL LAW

BY

W. DOUGLAS EDWARDS, LL.B.

[*COMMERCIAL SERIES*

Second Edition, Revised *Crown 8vo* *3s.*

A comprehensive outline of the Commercial Law of England adapted for students. As far as possible technical phraseology has been avoided, and the book has not been burdened with legal decisions.

THE RIGHTS AND DUTIES OF THE ENGLISH CITIZEN

BY

H. E. MALDEN, M.A.

Tenth Edition, Rewritten *Crown 8vo* *2s. 6d.*

METHUEN & CO. LTD., 36 ESSEX STREET, LONDON, W.C. 2

Books on Law

SELECT STATUTES, CASES, AND DOCUMENTS

TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY, 1660-1832

BY

C. GRANT ROBERTSON, M.A., C.V.O.

FELLOW OF ALL SOULS COLLEGE, OXFORD; PRINCIPAL OF THE UNIVERSITY OF BIRMINGHAM

Fourth Edition, Revised *Demy 8vo* *12s. 6d. net*

This volume is broadly divided into two parts: I. Select Statutes, with documents, where necessary, illustrative of them; II. Selected Examples (with citations from the texts of the decisions) from the most important cases in Constitutional Law and History. Throughout the Editor has added brief notes as to the authorities.

METHUEN & CO. LTD., 36 ESSEX STREET, LONDON, W.C. 2

Books on Law

A SHORT HISTORY OF ENGLISH LAW

FROM THE EARLIEST TIMES TO THE END OF THE YEAR 1911

BY

EDWARD JENKS, M.A., B.C.L.

Second Edition *Demy 8vo* *12s. 6d. net*

This book covers the whole ground of English legal history in due proportion and a readable manner. It deals but lightly with the constitutional side, which is well represented by existing works, and confines itself mainly to the doctrines and practice of civil (including criminal) law.

METHUEN & CO. LTD., 36 ESSEX STREET, LONDON, W.C. 2